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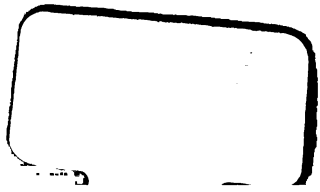

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ON THE

SUCCESSION TO PROPERTY

VACANT BY DEATH.

LONDON.
SPOTTISWOODE and SHAW,
New-street-Square.

A TREATISE

ON THE

SUCCESSION TO PROPERTY

VACANT BY DEATH:

INCLUDING INQUIRIES INTO

THE INFLUENCE OF PRIMOGENITURE, ENTAILS, COMPULSORY PARTITION, FOUNDATIONS, &c.

OVER

THE PUBLIC INTERESTS.

BY

J. R. Mc CULLOCH, Esq.

MEMBER OF THE INSTITUTE OF FRANCE.

"Je m'étonne que les publicistes anciens et modernes n'aient pas attribué aux lois sur les successions une plus grande influence dans la marche des affaires humaines." — De Tocqueville.

LONDON:

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MDCCCXLVIII.

(1848)

PREFATORY NOTICE.

In the following treatise we have endeavoured briefly to investigate the origin and practical operation of the principal rules and conditions under which property has been, and continues to be, transferred from the dead to the living. The importance of such an investigation, both in a historical and a political point of view, is obvious. Little, however, has been done by preceding inquirers to obviate the difficulties by which it is encumbered; for, though detached parts of the subject (such as the law of entail) have been repeatedly discussed, it has not been treated as a whole, or submitted to anything like a comprehensive examination. We dare not flatter ourselves with the idea that we have noticed all the topics which should be attended to in an inquiry involving so many considerations; but we would fain hope we have omitted few of any material consequence. Whatever judgment may be formed upon our conclusions, they are not the results of preconceived opinions or theories, but have been deduced from a careful appreciation of the more remote as well as the immediate influence of the different systems we have had to

review. And believing them to be well-founded, and consistent with the best interests of society, we have stated them fully and unreservedly.

Though unconscious of any undue bias in their favour, our inquiries have shown that the laws and customs which regulate the succession to property in England, are in most respects well fitted to reconcile conflicting interests, and to promote the well-being of the community; and that but little change is required to render them as nearly perfect as the nature of such institutions will admit.

But we have been obliged to come to a widely different conclusion in regard to the rules which determine the descent of property among our nearest and most powerful neighbours. And, if we have formed a correct estimate of their influence, it will be an additional motive for our adhering more firmly to our own.

The leading principles developed in this treatise were shortly stated in an article in the "Edinburgh Review" for July, 1824, and in a note to our edition of the "Wealth of Nations." But they are now, for the first time, laid before the reader in a systematic form; with illustrations, corrections, and modifications, supplied or suggested by farther and more attentive observation and inquiry.

London, December, 1847.

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Mr. Mc CULLOCH'S PUBLICATIONS.

Besides this Treatise Mr. Mc Culloch has published the following works, viz. —

1. A DICTIONARY, PRACTICAL, THEORETICAL, AND HISTORICAL, of Commerce and Commercial Navigation. A New Edition, illustrated with Maps and Plans. 1 very thick 8vo. vol. London, 1847.

N. B. A supplement to the editions published in 1844 and 1846, may be had separately.

2. A DICTIONARY, GEOGRAPHICAL, STATISTICAL, AND HISTORICAL, of the various Countries, Places, and principal Natural Objects in the World. Second Edition. 2 thick vols. 8vo. Illustrated with Maps. London, 1845.

3. A DESCRIPTIVE AND STATISTICAL ACCOUNT of the BRITISH EMPIRE, exhibiting its Extent, Physical Capacities, Population, Industry, and Civil and Religious Institutions. Third, and greatly improved Edition, 2 thick vols. 8vo. London, 1847.

4. SMITH'S WEALTH OF NATIONS; with a Life of the Author, Notes, and Supplemental Dissertations. New Edition. 1 vol. 8vo. double columns. London, 1846.

5. THE PRINCIPLES OF POLITICAL ECONOMY; with some Inquiries respecting their Application, and a Sketch of the Rise and Progress of the Science. Third Edition. 1 vol. 8vo. Edinburgh, 1843.

6. A TREATISE ON THE PRINCIPLES AND PRACTICAL INFLUENCE OF TAXATION and the FUNDING SYSTEM. 1 vol. 8vo. London, 1845.

7. LITERATURE OF POLITICAL ECONOMY: a Classified Catalogue of Select Publications in the different Departments of that Science, with Historical, Critical, and Biographical Notices. 1 vol. 8vo. London, 1845.

SUCCESSION TO PROPERTY

VACANT BY DEATH.

CHAPTER I.

Laws and Regulations relating to Wills and Testaments, and the Disposal of Intestate Property in Judæa, Athens, Rome, and England. — Bequeathing to Strangers. — Preference of Males over Females. — Rise of the Law or Custom of Primogeniture.

THE customs or laws which regulate the succession to the property of deceased persons, differ widely in different countries, and in the same countries at different periods. In some instances these differences appear to have grown out of accidental or inappreciable circumstances; in others they may be traced to the peculiar state and exigencies of the societies by which they have been adopted; while in a few they have resulted from the direct interference of government, which has endeavoured to make them square with its own views of policy. But, however, they may have originated, whether they should be ascribed to the mere influence of circumstances, or to design, the modes in which property is transmitted from the dead to the living exercise a very powerful influence over society. "I am surprised," says an able writer, "that

ancient and modern jurists have not attributed a greater importance to the laws of inheritance. It is true, they belong to civil affairs; but they ought, nevertheless, to be placed at the head of all political institutions; for, while political laws are only the symbols of a nation's condition, those which determine the descent of property, exercise an extraordinary influence over its social state. They operate in a uniform and certain manner. Man acquires through their means, a kind of preternatural power over the destiny of unborn generations. When the legislator has established the laws of succession, he may rest from his labours. The machine once set in motion, will go on for ages; and advance, as if self-directed, steadily to a certain end, according to the bias originally impressed upon it." * Hence the paramount importance of carefully inquiring into the principles and operation of those laws, that we may, if possible, ascertain which are most likely to promote the well-being of society.

It is not necessary in prosecuting an inquiry of this sort to take up the reader's time by entering into any statements explanatory of the advantages resulting from the establishment of a right of private property. These are obvious, and have been universally admitted. Till such right has been established there can be neither industry nor civilisation. Nothing could ever tempt any one to engage in a laborious employment; he would neither domesticate wild animals nor clear and cultivate the ground, if, after months and years of toil, when his flocks had become numerous, and his harvests were ripening for the sickle, a stranger were allowed to seize upon the produce of his industry. The utility, or rather necessity, of securing to every individual the peaceable enjoyment of the

* M. de Tocqueville, de la Démocratie en Amérique, c. iii.

produce he has raised, and of the ground he has cultivated and improved, is so very evident that it must have been perceived at the first institution of society. The author of the book of Job places those who removed their neighbours' landmarks at the head of his list of wicked men; and the early Greek and Roman legislators placed these marks under the especial protection of the god Terminus, and made their removal a capital offence.*

It is abundantly certain that in remote ages property every where descended on the death of the possessor, as a matter of course, to his children or nearest of kin. It is consonant to the sense of justice that it should do so. A man's children are more nearly connected with him than any one else; they usually live for a considerable period, and often till his death, in their father's house; and they frequently contribute by their industry to augment what is then, in truth, the common property of the family. Under such circumstances the bequeathing of the whole, or of any considerable portion of this property to strangers, appears to be a most unwarrantable proceeding, and one which hardly any provocation on the part of the children would justify. And it seems to have been universally regarded in this light in the earlier periods of society. The power of devising property by will or testament was then unknown. In Athens, no property could be devised from the natural heirs previously to the age of Solon; and that legislator confined the privilege to do so to such as had no children. In Rome, where the paternal authority was carried to an extreme, the right of the children to succeed to the property of their father was, for a lengthened period, indefeasible, except by a will made in an assembly of the people; and in that case

* Goguet de l'Origine des Loix, &c., lib. i. art. 2.

the will, as Montesquieu has remarked, was not the act of an individual but of the legislature.* Roman children were called the necessary heirs (*necessarii heredes*) of their fathers; and were reckoned, even in the lifetime of the latter, as a species of co-proprietors, or *com-domini;* so that their succession at their fathers' demise appeared to be rather a continuation and extension of rights they already enjoyed, than an acquisition of new ones—*Post mortem patris, non hereditatem percipere videntur, sed magis liberam bonorum administrationem consequuntur; hac ex causa licet non sint heredes instituti, domini sunt.*† The same principles prevailed among our German ancestors.—*Heredes successoresque sui cuique liberi*‡, *et nullum testamentum; si liberi non sunt, proximus gradus in possessione fratres, patrui, avunculi.* (Tacit. de Morib. Ger. § 20.)

But in the course of time the serious inconveniences incident to this strict rule of succession begin to disclose themselves, and power is, consequently, given to the possessors of property to dispose by will of some portion of their personal or real estate. It is obvious, indeed, that the practice of lineal succession could not be enforced

* Esprit de Lois, liv. xxii.

† Digest. lib. xxviii. tit. ii. § 11. It should, however, be observed that the above statements apply to those children only who continued subject in all respects to the parental authority, though, as these formed the vast majority, the exceptions were of trifling importance. In the earlier ages of Roman history, the unlimited subjection of children was reckoned so much a part of the relation of parent and child, that when the latter was emancipated he ceased to be regarded as belonging to his father's family; and lost, with the acquisition of his freedom, all claim to any portion of the paternal estate. But in the course of time the rigour of the old law was gradually softened down; and eventually emancipated and posthumous children were entitled to the same privileges as others. (Terasson, Histoire de la Jurisprudence Romaine, p. 127.; Gibbon, cap. xliv., &c.)

‡ By liberi in this sentence are to be understood sons. See *post.*

without, at the same time, prohibiting the alienation of property; for, if a man may alienate, or dispose of his property during his lifetime, his heirs at law may be as effectually disinherited as if he were permitted to bequeath his property to others to their exclusion. The ability to alienate movable property is, however, indispensable to enable society to make any progress, or even to emerge from barbarism; and independently of the power to alienate being essential, and of its being alike impossible to prevent its exercise, or to ascertain the motive that may lead to it, the reasonableness and propriety of those who have no near relations, or who may have been deeply indebted to strangers, transferring a part, at least, of their property to their friends and benefactors, must in no long time have become apparent. Hence the principle of allowing property to be disposed of by will or testament was necessarily, though gradually and slowly, introduced. But the strong sense of the paramount claims of children to the inheritance of their fathers made it, for a lengthened period, be carefully guarded and restricted. Solon, as already seen, granted the power of leaving property by will to those only who had no children; and elsewhere, in the event of there being children, the power of the testator was either limited to increasing the portions of those whom he preferred without entirely disinheriting the others; or, if he were permitted to introduce strangers into the will, the share of his fortune he might leave them was usually but small.

If, indeed, we take the literal interpretation of a law of the Twelve Tables, promulgated at Rome, A. U. C. 304 (B. C. 450), it would appear to give an unbounded license to the disposal of property by will — *Pater familias, uti legassit super familiæ, pecuniæ, tutelæve suæ rei, ita jus esto:* — that is, "Let the disposition which the father of a

family makes of his property, and of the guardianship of his children, have the force of law." But we agree with those who think, that though expressed in general terms the power of the testator must have been really limited; and that, in the event of children being alive at the demise of the father, some portion of the property would be secured to them independently of the will. The supposed right of the children to succeed to the paternal property was then too firmly fixed in the public mind, to allow of its being wholly set aside by a law of this sort. It is true that advantage was subsequently taken of this law, or, more probably, perhaps, of the change in public opinion in regard to the necessary succession of children, to substitute other heirs for them. But at no period of the Roman history was this permitted without restraint. The Furian, the Voconian, and the Falcidian laws were passed, the first two under the republic, and the latter under Augustus, to secure the interests of children by limiting the power of fathers to make settlements to their prejudice. It was necessary in the later ages of Rome to give validity to a will that all the children of the testator, whether male or female, natural or adopted, should be named in it; and that those not appointed heirs or legatees* should

* The Roman law made a wide difference between an heir and a legatee. The individual named as heir in a will was understood to represent, or rather to be identical with, the testator in his capacity of citizen; and had, consequently, not only to discharge the various legacies specified in the will, but also the debts and other obligations of the deceased. But as heirs might have been involved in ruin by subjecting themselves to such responsibilities, a year was allowed them to decide whether they would accept the succession; and in the end they were authorised by Justinian to accept it *beneficio inventarii*, or with a limitation of their liability to the extent of the testator's effects as ascertained by an inventory of the same taken at his death. (Instit. lib. ii. tit. 19.; Cod. lib. vi. tit. 30, &c.)

be expressly disinherited, the reasons being at the same time specified why this step was taken.* But the disinherison of children being apparently an unjustifiable and vindictive as well as an unusual proceeding, those who had the misfortune to be disinherited were authorised to bring an action (*Querela inofficiosi testamenti*) to have the will set aside by showing that it was deficient in natural affection (*officio pietatis*); and that they had been deprived without just cause of their rights; that is, of the portion of their parents' estate to which dutiful or properly conducted children were legally entitled.† If they succeeded in this action the testament was partially set aside, and the portion in question, which, previously to the age of Justinian, amounted to a fourth part of the paternal estate, was conveyed to them.‡ According to the law of Justinian, if a man left one and not more than four children, they succeeded as of right to a third part of his property; and, if he left more than four, they succeeded to a half.§

The right to dispose of property by will has also, in most modern countries, been extended by slow degrees. In England, in the reign of Henry II., a man's goods, or movable estate, were divided into three equal parts, of which one went to his heirs or lineal descendants, another to his wife, the third being at his own disposal; or if he died without a wife, he might then dispose of one

* This is the law as laid down by Justinian; but for some considerable time previously it was not necessary to the validity of a testament that the names of female children should be specified. They had been allowed, after the Voconian law had fallen into disuse or been superseded, though not named in the will, the same portions as their brothers (Instit. lib. ii. tit. 13. See also Gaii Instit. lib. ii. tit. 3. De Exheredatione).

† Instit. lib. ii. tit. 18.

‡ Spence's Equitable Jurisdiction of the Court of Chancery, i. 310.

§ Terasson, Histoire de la Jurisprudence Romaine, p. 125.

moiety, the other going to his children; and so *e converso*, if he had no children, the wife was entitled to one moiety, and he might bequeath the other. If he died without either wife or issue, the whole was at his own disposal. The shares of the wife and children were called their reasonable parts; and the writ *de rationabili parte bonorum* was given for their recovery. *

This was for long after the law of the land; and though changed by imperceptible degrees, it continued down to a comparatively late period, or to the early part of last century, to be the law in Yorkshire, Wales, and in the City of London. It was then, however, abolished by successive statutes; and a man in any part of England may now devise the whole of his goods and chattels as freely as he could formerly devise his third part or moiety. †

The law of Scotland, in regard to the devising of movables, is at present nearly identical with the old law of England. In the former, if a father die leaving a widow and children, whether of the last or of any former marriage, the children succeed to a third part of his movable property as *legitim* (from the *legitima pars* of the Romans), and the widow to another third part. If there be no widow, or if she have renounced by her marriage contract the *jus relictæ*, the *legitim* of the children amounts to half the personal estate. And it is farther to be observed, that the right of the children to claim their *legitim* cannot be defeated by testament; though it may be defeated by the father converting his movable into fixed property, and by his executing a *de præsenti* conveyance of his whole movable estate to others. If, however, it should appear that these measures were

* Blackstone, book ii. c. 32.

† This is the statement of Blackstone; but there is a doubt whether the city of Chester be not still subject to this ancient custom. (Stephen's Comment. ii. 229. note.)

taken collusively, not with a view to the proper administration of his estate, but to defeat the claim of the children, they would be set aside by a court of law.*

The right to make testamentary dispositions of fixed property or land has in all countries been more slowly recognised than the right to dispose of movables. But a sense of the expediency of allowing its owners to dispose of it at their death as the interests of their families or the justice due to their creditors might seem to require, led gradually to the evasion and relaxation, and, in some instances, to the total abolition of the restrictions on its devisal. In England the restrictions in question continued to exercise a powerful influence down to the reign of Henry VIII., when they were much modified. And after the Restoration, the power of devising fixed property was rendered, though indirectly, nearly as unlimited as at present.† In Scotland, down to a comparatively recent period,

* Erskine's Principles of the Law of Scotland, 12th ed. p. 435. Bell's Dictionary, voce *Legitim*, &c.

† The lands which individuals had themselves acquired, and which, on that account, were supposed to be more peculiarly their own than those which had descended to them from their ancestors, seem, almost everywhere, to have been those of which they were soonest permitted to dispose by will. In the laws of Henry I. (No. 70.), it is laid down, "*Acquisitiones suas det cui magis velit; si Bocland autem habeat quam ei parentes sui dederint, non mittat eam extra cognationem suam.*" But, once begun, the practice of devising certain descriptions of land by will has usually been extended to all descriptions, whether acquired by inheritance or by purchase. Before the reign of Henry VIII. fee simple lands had, in fact, become devisable under the practice of vesting land in trustees, or, as it is technically called, of conveying to uses. The stat. 32 Henry VIII. c. 1. enabled all persons freely to dispose of lands held in soccage (that is, lands held by other than a military tenure), by will or testament; and an act passed in the reign of Charles II. (12 Charles II. c. 44.), having converted all tenures into free and common soccage, consequently brought all sorts of immovable property within the scope of the act of Henry VIII. The prejudice against devising paternal estates has not however wholly

almost all property in land was inalienable from the lineal heir.*

It would be useless to take up the reader's time by dwelling at any length on the advantages resulting from permitting, if not an entire, at least a very considerable degree of freedom to those who wish to devise property by will. The ability to make testamentary bequests, to transmit our property to those who occupy the chief place in our affections, or to whom we have been under obligations, is indispensable to the advancement of society in wealth and civilisation. *Nihil enim tam conveniens est naturali æquitati,* say the Roman jurists, *quam voluntatem domini volentis rem suam in alium transferre, ratam haberi.*—(Instit. lib. ii. tit. 1. c. 40.) Without this power a man is not the master of his own fortune, which, unless he dispose of it during his lifetime, may go (should he have no children) to unknown heirs, about whom he can feel no solicitude; or supposing he has children, it may go, if he cannot influence its destination, to those whose undutiful conduct may have made them objects of his dislike. And whoever may be his heir, it is plain he will, in most cases, be comparatively little zealous about the accumulation of that of which he cannot freely dispose. Happily, however, it is quite otherwise when full effect is given to the instructions

lost its hold. "An ancient estate," says Johnson, "should always go to males. It is mighty foolish to let a stranger have it because he marries your daughter, and takes your name. As for an estate newly acquired by trade, you may give it if you will to the dog Towser, and let him keep his *own* name."—(Boswell's Johnson, ii. 225. Pickering's ed.)

* In Scotland, at this moment, fixed property is not devisable by will. But the difference between the Scotch and English practice is, notwithstanding, immaterial; for a deed disposing of land in favour of any one, found in an individual's repositories after his death, is effectual in Scotland.

in wills and testaments for the transmission of property. By gratifying that love of power inherent in every man, the privilege of bequeathing acts as an efficient spur to industry; makes immediate become subservient to prospective considerations; and sets, as Blackstone has stated, "the passions on the side of duty." All classes feel its powerful influence. The labourer strives to increase his deposits in the Savings Bank; the farmer and retail dealer become more active and enterprising; and the plans and combinations of the capitalist cease to be circumscribed by the brief duration of human life. The right to name his heir, makes him engage with ardour in undertakings, of which posterity only can reap the full advantage. He shares by anticipation in the consideration to be enjoyed by his successors; he is elated by their fancied distinction; and for their sakes strives with unabated or increased anxiety to accumulate wealth far beyond the measure of his own wants and desires. The truth of these statements is too obvious to be disputed, and has been admitted by all publicists and inquirers into the history of society.* The well-informed author of the *Richesse de*

* By none, however, has it been so well illustrated as by Craig:— "Hominum non tantum ea cura est, ut liberi educentur, sed etiam, ut post sua fata, eis quam maxime consulatur. Hinc illæ in vita curæ, anxietates, labores, fatigationes, discrimina etiam vitæ, non ut sibi solis, sed posteris etiam provideant: arbores etiam serunt, quarum fructibus nunquam vescentur; ædificant etiam quibus brevis habitandi usus relictus est; opes cogunt, quibus nunquam usuri sunt; supellectilem parant, cujus viliori parte, ipsi dum vivunt, fruuntur, melior pars ad heredes perventura: neque enim, ut nobis tantum consulamus, tam misere cogendis opibus immorimur et tabescimus, sed ut posteris bene sit, quibus prospectum anxie cupimus. Hæc itaque successio ex æquitate naturali, et charitate sanguinis descendit, et per omne jus, quod inter homines colitur, tam altas radices agit, ut difficulter quassari, difficilius evelli possit: citius enim naturam ipsam ex animis hominum expellemus quam jus et curam successionis." (De Feudis, Lib. ii. Dieg. xiii. § 3.)

la Hollande ascribes a large share of the wealth of that republic to the freedom of bequeathing property by will. "La liberté de tester," says he, "celle de disposer à volonté de ses biens par un acte de dernière volonté, peut encore être mise au nombre des causes, qui ont contribué à animer l'industrie des habitans. Quelque indifférent que l'on soit sur le partage des biens que l'on laisse en mourant, l'idée de pouvoir en faire jouir ceux qu'on veut en gratifier, est sûrement un aiguillon qui doit exciter au travail, ou du moins prévenir qu'on se dégoûte d'accumuler des richesses. Pourquoi travaillerai-je à augmenter ma fortune si je suis obligé de la laisser à ceux qui ne m'en sauront aucun gré, et qui ne la mériteront pas? La liberté de disposer librement de ses biens par testament, est peut-être la principale cause que les fortunes des particuliers sont plus considérables en Hollande que partout ailleurs."—(i. 304.)

"Hence," to borrow the forcible expressions of Sir John Dalrymple, "it comes to be law, because it is every body's interest it should be law, that men may name heirs by testament as they please."*

And yet it is not to be denied, that the unrestrained power of devising property by will, such as now exists in England, leads occasionally to results not easily reconciled to our sense of what is just and proper. A deserving family is sometimes disinherited through the caprice or crotchet of the father, and sometimes this result is brought about by his becoming a prey to the arts and flattery of designing parties. Such instances revolt the public feeling. And it is contended that to obviate their occurrence we should follow the example of the Romans; that no individual possessed of property should be permitted to throw his children destitute upon society; that the fear of total

* Essay on Feudal Property, 3d ed., p. 154.

disinherison should not be rendered an instrument of tyranny in the hands of fathers; and that before allowing a man to leave any portion of his fortune to others, he should be compelled to make adequate provision for those he has been the means of bringing into the world, to whom, independently altogether of any considerations of personal merit or demerit, he is under the most sacred obligations.* But though it must be owned that this is a question of much difficulty, and with respect to which it is not possible to come to any conclusion that may not be open to objections, yet, on a dispassionate view, it would seem that the reasoning of those who argue in favour of the unrestrained power of devising by will is the most satisfactory. It might, perhaps, be expedient (though we do not lay much stress on the suggestion) to encroach so far on this principle as to make the fortunes of people possessed of property, in the event of their dying while their children are in a state of pupilage, responsible for their maintenance and education till they come to maturity, or are in a condition to support themselves.† And we do not know that we should be disposed to dissent from the opinion of those who contend that a *legitim*, or fixed portion of the paternal estate, should be ensured to unmarried daughters. But it would be inexpedient to go farther than this. The most cogent reasons can alone justify a legislature in giving its sanction to any measure having a tendency to weaken the spirit of industry and economy in the people, and the dutifulness and obedience of children. It is plain, however, that if it interfere to regulate the disposal of property it will unavoidably do this, either to a less or a greater extent.

* This principle has been adopted to a certain extent in the law of Scotland. See *antè*, p. 8.

† Grotius and Puffendorf argue in favour of this principle. See Grotius, lib. ii. c. 7. § 4. Puffendorf, lib. iv. c. 11. § 4.

Suppose it were enacted that, how undutifully soever a man's children or relations may have behaved, they shall, notwithstanding, be entitled to the whole or to a certain portion of his fortune: this would, in the first place, render most people less anxious about the accumulation of wealth; and, in the second place, the securing of some provision for children, without reference to their conduct, would in so far make them independent, and weaken that parental authority, which, though sometimes abused, is, in the vast majority of instances, exercised in the most indulgent manner, and with the best effect.* Hence, on the whole, we are inclined to think that the more this subject is inquired into, the more it will appear that it is best to abstain from interfering with the right of parties making testaments, to name their immediate heirs. The humanity of the law is but a sorry substitute for parental affection. If children be ordinarily well behaved, and be not extremely deficient either in filial affection, or in common prudence, we may be assured that but few parents will be disposed to leave their property to others to their exclusion. Such a proceeding being opposed not only to some of the more powerful principles and instincts inherent in our nature, but also, to the opinions and feelings of society, can never be of frequent occurrence. And there is, perhaps, reason to fear that the establishment of a *legitim* in favour of children, by lessening the odium which at present attaches to their unjustifiable disinherison, might really prejudice their interests. The interference of the legislature in their behalf appears,

* Burlamaqui tells us, that in the Pays de Vaud in Switzerland, children succeeded to half the property of their parents as *legitim*; and he adds, "*ainsi nous ne devons pas être surpris si nos enfants se regardent de fort bonne heure comme maîtres des biens paternels et maternels, au grand préjudice de leur éducation.*" (Principes du Droit de la Nature et des Gens, iii. 211. ed. 1820.)

therefore, to be in all cases of doubtful policy, and, in general, unnecessary or mischievous. In countries, like England, in which the greatest latitude is given to the power of bequeathing, there are but few instances of affectionate and dutiful families having suffered from their fathers being permitted to leave their fortunes to strangers: and how much soever we may lament their occurrence, it may be doubted whether it would be at all expedient to attempt to obviate evils which happily are very rare, by taking away or limiting the power to disinherit. You cannot do this without in so far exempting children from the constant influence of a salutary check over their vicious propensities, and compelling that property to be sometimes bestowed on profligacy or idleness, which is usually the fruit, and is always the appropriate reward of virtue, economy, and industry.

But, though the possessors of property may be advantageously left with little or no restraint to follow their own inclinations in its disposal by will to immediate heirs, they may not, and very many of them do not, avail themselves of this power; and in such cases, more especially when a party dying intestate either leaves a number of descendants, or when he leaves none, the law must interfere to determine the rights of those claiming to be heirs, and to prevent the disputes and litigation that would otherwise arise amongst them. But it is needless to seek in the laws and customs regulating succession *ab intestato*, for any general rules or principles to be followed in such cases. Those adopted in different countries depend partly on the peculiar maxims and opinions prevalent in each, and partly on the circumstances under which they may happen to be respectively placed. And as these opinions and circumstances differ very widely, this, also, is the case with the laws and customs to which they give rise.

In most countries a preference has been given in regulating the succession to property vacant by intestacy, and also in devising property by will, to heirs male. And in some countries in antiquity, and still more in modern times, a marked predilection has been shown in favour of the eldest son, or as it is more usually termed, in favour of the *right or custom of primogeniture.* The eldest, or first-born, sons of Jews had a double portion of their father's inheritance. It is, however, worthy of remark, that, previously to the age of Moses, there was no certain rule as to who should be considered the first-born son; fathers, who had a plurality of wives, having been permitted to select the eldest son of whichever wife they pleased to enjoy that distinction. The cabals, jealousies, and hatreds, which the right to exercise so invidious a privilege must have occasioned in families, are too obvious to need illustration. Moses, in consequence, decreed its abolition; and laid it down, that the son who was first-born in point of time should be recognised as such, without regard to the estimation in which his mother might be held, and have twice the portion of his brothers.*

The bias in favour of males might arise in rude ages from the superior importance attached to strength of body and personal courage; and in countries where the preservation of families, and the continuance of property in a peculiar line, are deemed objects of national importance, a preference will naturally be given to the eldest sons; and females will be debarred, where there are sons, from the greater part, if not the whole, of the succession; because they must necessarily by their marriage, break the family descent, and carry the estate to others. But in whatever way it may be accounted for, this preference of males to

* Deuteronomy, xxi. 15. 17.

females has obtained very widely. Among the Jews and Greeks (at least among the Athenians), females, when there was a son alive at their father's decease, had no absolute right to any portion of his property. They were left to depend on the affection and liberality of their brothers; but the latter were expected, and might have been compelled by the interference of the magistrate, to give them dowries.* In Judæa, in the event of the father leaving no male heirs, daughters succeeded to his estate, under the condition of their not marrying into another tribe. In Athens, a different and a harsher rule towards females was adopted. The object in it being to preserve property in the same families, the nearest kinsmen on the father's side were entitled to claim the estates of an individual who had left daughters only, provided he had not made a will bequeathing his estates to specified parties bound to marry his daughters. If no such will were in the way, or if it were set aside, the estates became the property of the kinsmen referred to, on condition of their marrying the heiresses, or giving them suitable portions. The latter do not appear to have been allowed any choice in a matter in which they were so much interested. To such an extreme, indeed, was this principle carried, that when parties died leaving estates and daughters married in their lifetime, without any legitimate sons, their kinsmen might (as they sometimes did) not only claim the estates, but might also take the daughters from their husbands and families, and force them to become their wives! As some compensation for this monstrous treatment, daughters were entitled to demand of those who

* Michaelis on the Laws of Moses, i. 421., Eng. trans.; and the learned Commentary added by Sir William Jones to his translation of the Orations of Isæus, p. 170.

succeeded to their father's estate, that they should either marry them, or allow them adequate provisions.*

The customary law of the Arabians previously to Mohammed obliged brothers to give marriage portions to sisters; but this obligation was evaded by the contracting of double marriages, one man taking the sister of another without a portion, and giving his own sister in return on the same terms. The Prophet denounced this practice as illegal; and directed that females should inherit a certain portion of whatever their fathers or kinsmen might leave, allowing a *double portion* to the males, on account, as he rather ungallantly states, of the advantages which God has given them over the other sex.†

It has been usually supposed that a different policy prevailed in Rome, and that sons and daughters were there entitled to an equal share of the patrimonial estate. But though this be the rule laid down by Justinian for the distribution of intestate property‡, it is doubtful whether it prevailed in the earlier and better ages of Roman history. It has been supposed by some that females were excluded by a law of the Twelve Tables, from the succession to property left intestate, and notwithstanding the preponderance of authority on the opposite side, the question is not free from difficulty.§ But the

* Isæus, by Jones, p. 175. &c.; Potter's Grecian Antiquities, book iv. c. 15.; Herman's Political Antiquities of Greece, § 121. At Lacedæmon, where the treatment of women was better than at Athens, heiresses were compelled to marry such individuals as their fathers or guardians might select for their husbands. (Aristot. Politica, lib. ii. c. 6. § 11.)

† Sale's Koran, i. 94. and 100. ed. 1764.

‡ Instit. Lib. tit. iii. 1. c. 6.

§ The law of the Twelve Tables, on which this question principally hinges, is given by James Godfrey (lat. Gothofredus), as follows: "*Ac si intestato moritur pater-familias, neque ei suus hæres erit, tum agnatus*

succession of females of the higher orders, or of those whose fathers were enrolled in the census, whether it originated in law or custom, being supposed to be productive of various inconveniences their right of inheritance was suppressed by the Voconian law, enacted A. U. C. 584; which, also, limited the legacies that might be left to women. * And though the existing fragments of this law had been less explicit than they appear to be, the imposition of some restraints on female succession seems to be so much in accordance with the policy of the Romans, that it might have been presumed. They (or

proximus suus hæres esto: si agnatus non erit, tum gentilis hæres esto." Sir Matthew Hale is one of those who have held, that females were excluded from the succession to intestate property in the early ages of Roman history (Hist. Common Law, p. 246. ed. 1779), and this, also, was originally the opinion of Hugo (Hist. Roman Law, § 115., note 2.). The latter subsequently renounced this opinion, but it may be doubted whether the grounds on which he did so were satisfactory. "Ce qui," to borrow the words of his French translator, "Ce qui m'avait porté à former cette conjecture (that women could not inherit intestate property), c'est que la loi Voconia excluait les filles de la succession testamentaire, et que chez les Germains les femmes n'héritaient jamais des immeubles. En effet, pourquoi le motif qui s'oppose en Allemagne à la succession des filles, c'est-à-dire, celui que *la femme ne protège pas*, n'aurait-il pas eu autant de valeur chez les Romains, qui n'étaient pas moins guerriers que les Germains?" And he goes on to support his original opinion by other, and these not easily answered, arguments.

* Various opinions have been entertained with respect to the provision in this law limiting the portions left to women. The statement of Forcellini, though brief, seems to be at once clear and satisfactory. "*Voconia lex de coercendis mulierum hæreditatibus, lata fuit a Q. Voconio Saxa Trib. Pleb. Sancitumque in ea, ne qui census esset, virginem, neve mulierem supra quadrantem suorum bonorum hæredem institueret, plusve cuiquam legaret, quam ad hæredes perveniret: item ne feminæ cuiquam ab intestato succederent.*" Cicero describes a curious case that grew out of this law in his Treatise de Finibus, lib. ii. c. 17. See also Cicero, in Verr. 1. c. 42., Montesquieu, lib. xxvii., Gibbon, book xliv. &c.

at least the Patricians) regarded the continued descent of names, families, and property, in the same line of male heirs, as an object of the highest importance: and to prevent the chain being broken, individuals without sons, or a reasonable expectation of having any, were allowed the privilege of adoption; that is, they were permitted to adopt the sons of other parties, who assumed their names, became a part of their families, and succeeded at their demise to their property and privileges as if they had been their legitimate natural born children. It is not easy to suppose, that the equal division of property among the sons*, would be generally practised by parties who resorted to such means for perpetuating its descent in the same lines. But the admission of females to the like rights of succession as males, would have been inconsistent not only with the lineal descent of property in the same family, but even

* And, though usually taken for granted, there is no evidence to show that the paternal property was divided equally among the sons. On the contrary, the fair presumption is that it was not. Provided the sons received the *legitim* allowed them by law, they had no legal claim to anything more. Their fathers might bequeath the surplus to whichever of their natural born or adopted sons they pleased, or they might pass them over and leave it to strangers. But the magnitude of estates under the Imperial government, and their continuance in the same lines, sufficiently prove that the surplus in question was usually left to one or other of the sons. Had it been customary to divide estates equally among the latter, it would have been all but impossible for them to have attained to the limits they appear to have reached at the period referred to, and in the latter ages of the Republic. "*On peut être étonné*," says M. Dureau de la Malle, "*que les auteurs des lois agraires n'aient pas proposé, pour en assurer le maintien, l'egalité de partages dans les successions, la division de l'hérédité en ligne masculine et feminine, enfin la limitation du droit de tester.*" (Economie Politique des Romains, ii. 285.) But had they done this, agrarian laws (taking the phrase in its ordinary sense) would have been wholly unnecessary. A system of gavelkind and large or even considerable estates cannot exist together.

in the same *gens* or lineage; inasmuch as, they might have carried by their marriage the whole estate of their fathers into different, and perhaps rival houses. It is true, that in the progress of the Republic, when wealth and military reputation acquired a preponderating ascendency and the antiquity and distinction of families were less regarded, various means were devised, by eluding the obligation to enrol in the census, and by the agency of trust settlements and otherwise, to defeat the conditions in the Voconian law; but it, notwithstanding, continued for a lengthened period to exercise a considerable influence.* Indeed, it was not till the age of Justinian that daughters were placed, as regards the succession to property, exactly on the same footing as sons. They were then entitled to share equally with the latter in the fortune of their fathers; and all previous distinctions between collateral kindred of the same degree of propinquity, whether on the side of the father or the mother, were abolished.

We may perhaps be excused for observing that, though there were nothing in the state of society to justify the preference which its laws or customs may give to males over females in the succession to property, the injury it inflicts on the latter is more apparent than real. The sexes are always pretty nearly balanced, and if men with fortunes must choose their wives among women who have none, the inequality created by the law of succession will be in so far obviated. In such a society, beauty and accomplishments would have their proper value; and they would not, as is often the case in more civilised, and, pro-

* Augustus obtained leave from the senate to bequeath a third part of his fortune to Livia, notwithstanding any law to the contrary. This most probably had reference to the Voconian law, by which such legacies were limited to a fourth; but the inference is not quite certain. (Suetonius, Vit. Aug. c. 102. ed. Pitisci.)

bably, also more corrupted societies, be neglected for mere wealth.

According to some authorities, our Saxon ancestors were less prejudiced. Tacitus has borne testimony to their respect for women; and they are said to have evinced it by showing no preference to males over females in the succession to property, all the children sharing equally in the estate, whether land or movables, of their deceased parents. The least investigation would, however, have shown the groundlessness of this opinion. Among the Germans, previously to and after the fall of the Western Empire, land and herds constituted the only species of property of any importance; and the government and police being alike imperfect, it is natural to suppose that they would be inherited by the male sex, or by those who were best able to defend them. And such we find to have been the case. There is much variety of opinion as to the meaning to be attached to the term *Salic* land (*terra Salica*): most probably it consisted of land that had descended from one's ancestors (*terra aviatica*); but whatever it may have been, it was very extensive, being widely distributed over the countries occupied by the Germans; and it could, as every one knows, be inherited by males only. The laws of the Thuringians, Ripuarians, Saxons, Franks, Burgundians, and, generally, of the Germanic nations, exhibit the same bias. All of them, with the single exception of those of the Visigoths*, give a decided preference to heirs' male, in so far as regards the succession to land: in some instances females were excluded under any circumstances from its inheritance; and

* The code of the Visigoths is indebted for this exception, and for its comparative regularity, to its being in part borrowed from, and founded on, the Roman law.

when they were less unfavourably treated, their right to succeed to it depended, almost invariably, on their having no brothers.*

The same principles would seem to have prevailed in England. It is admitted by the best critics that the custom, or law of *gavelkind*, which still prevails in Kent, existed previously to the Conquest, and that it most probably extended over the greater portion of England and Wales.† According to this custom, lands within the county of Kent, unless specially excepted by an act of the legislature, descend, in the event of the father dying intestate and leaving sons and daughters, in equal portions to the sons, to the exclusion of the daughters; but in the event of his leaving daughters only, they divide equally amongst them.‡ This law still subsists in the copyholds of the manors of Stepney and Hackney, in Middlesex, and in a few other places beyond the confines of Kent.§ The custom of borough English, in virtue of which the youngest son succeeds to the inheritance, on the

* Among others, the reader may refer to the following authorities; viz. the note in Brotier's Tacitus, iv. 188. (4to. ed.), *De Successionum Legibus apud Germanos;* Montesquieu, liv. xviii. c. 22.; Meyer, Institutions Judiciaires, I. 66.; Guizot, Essais sur l'Histoire de France, p. 95.; Spence's Inquiry into the Origin of Laws, &c., pp. 393—398.; Laboulaye, Histoire du Droit de Propriété, p. 417.; Hallam's Middle Ages, I. 145. 1st 8vo. ed., &c.

† Edward I., by his regulations for the government of the principality, issued in 1284 from Rhydland in Flintshire, expressly preserved to the Welsh their custom of gavelkind. It was, however, suppressed by the stat. 34 & 35 Henry VIII. c. 26. § 91. which enacts that, henceforth lands in the principality shall descend according to the law of England.

‡ Hasted's Kent, 8vo. ed. I. 311—321. It is, however, worthy of remark, that in Wales, contrary to the practice in Kent, women never inherited: when there were no sons the property went to the next heirs male. (Robinson on Gavelkind, 2d ed. p. 19.)

§ Robinson, *ubi suprà*, p. 34., &c.

intestacy of the father, to the exclusion of his brothers and sisters, has prevailed in the town of Stamford, and one or two other places, time immemorial; and, as respects copyholds, it still subsists in different manors in different parts of England.*

But whether property descended previously to the Conquest to the sons only, or indifferently to the sons and daughters, the introduction, or rather extension of the feudal system after that event, necessarily led to a change in the succession to property in land, and paved the way for the universal introduction of the custom of primogeniture. The holding of a proper fief, or feudal estate †, by a woman, was inconsistent with the principles of the feudal system; it being impossible for her to render those military services which the holders of such fiefs were bound to perform. Females were therefore, in some countries, wholly excluded from the succession to proper fiefs; but in England this principle was so far relaxed that they were preferred to collateral relations, their exclusion taking place only when there were sons to inherit. The division of fiefs among the latter, was also very soon found to be either impracticable, or productive of the greatest inconvenience. Titles, or honorary distinctions, having begun at an early period to be attached to some of the great feudal estates ‡, it became necessary that their partition, which

* Montesquieu says, that this custom prevailed in his time in the Duchy of Rohan, in Brittany. (Liv. xviii. c. 21.)

† By a "proper fief," is meant a fief given for, and held by, the tenure of military service. But though this was by far the most common, there were many other descriptions of fiefs. (For an account of which see Wright on Tenures, pp. 22—34. ed. 1792; and Ducange, voc. *Feudum*.)

‡ Originally, all baronies were territorial, and were possessed by tenure only, and not by writ or patent.

would have been equivalent to a partition of titles, should be prevented; and the Emperor Frederick I. (Barbarossa), who ascended the throne in 1152, issued a constitution to that effect.* And, independently of this circumstance, the partition of estates was objectionable from its diminishing the power of the lords to maintain a force sufficient for their defence against the attacks to which they were then always exposed. In those turbulent times, "the security of a landed estate, the protection which its owner could afford to those who dwelt on it, depended upon its greatness. To divide it was to ruin it, and to expose every part to be oppressed and swallowed up by the incursions of its neighbours."† Its partition led, also, to a decrease, as well as to a division of the military services due to the sovereign or superior lord‡, to an increase in the number of infant tenants incapable of performing any kind of duty, and to the idleness and poverty of the tenants of estates that were much subdivided. It was plainly, therefore, for the joint interest of their pro-

* Schmidt. Hist. d'Allemagne, III. 400. Earldoms and baronies had, however, been rendered indivisible, both in England and France before the appearance of this constitution, except in the case of a baron leaving daughters only. (Lyttelton, Henry II., vol. iii., 122. 8vo. ed.)

† Wealth of Nations, p. 170.

‡ The holder of a knight's fee was bound to serve his sovereign annually for forty days as a horseman, fully armed and equipped, at his own expense. But the holder of a moiety, or a fourth part of a knight's fee, was only bound to serve twenty or ten days, as the case might be. Hence, the splitting of feuds had the effect of inconveniently increasing the number of the forces at the commencement of a campaign, and of so limiting the duration of their service, that they became useless for any thing unless it might be attempted by a *coup-de-main*. The quality of the feudal militia was, also, much deteriorated by the subdivision of fiefs; the holders of small portions not being able to furnish a completely equipped horseman even for the shortest period. — (Lyttelton, Henry II. vol. iii. pp. 83—92. 8vo. ed. &c.)

prietors, and of the crown, that the division of feudal estates should be prevented. And hence we find, that their succession early devolved on the eldest sons, who were soonest able to perform the duties of the fee, to the exclusion of their brothers; and hence, also, though at a later but still pretty remote epoch, lands in soccage, in imitation of lands in chivalry, were made to descend according to the law or custom of primogeniture. In fact, it was only by attaching themselves to some feudal lord, and becoming his vassals, that allodial proprietors could acquire any portion of that security which neither the law nor the royal authority was then able to afford.*

* Hale's Hist. Common Law, c. 11.; Blackstone, Book II. c. 14.; Hallam, Middle Ages, Part I. c. 2., &c.

CHAP. II.

Influence of the Law, or Custom, of Primogeniture.

BUT however advantageous or necessary when introduced, Dr. Smith, and other philosophers *, have taken a very unfavourable view of the influence exercised by this custom in modern times.—"Laws," says Smith, "frequently continue in force long after the circumstances which first gave occasion to them, and which could alone render them reasonable, are no more. In the present state of Europe, the proprietor of a single acre of land is as perfectly secure in his possession, as the proprietor of a hundred thousand. The right of primogeniture still, however, continues to be respected; and as, of all institutions, it is the fittest to support the pride of family distinctions, it is likely to endure for many centuries. In every other respect, nothing can be more contrary to the real interest of a numerous family, than a right which, in order to enrich one, beggars all the rest of the children." (Wealth of Nations, p. 171.)

But notwithstanding the apparent reasonableness of this opinion, and the authority by which it is supported, we confess we do not think it has any really good foundation.

* C'est un esprit de vanité qui a établi chez les Européens l'injuste droit d'aînesse, si défavorable à la propagation, en ce qu'il porte l'attention d'un père sur un seul de ses enfants, et détourne ses yeux de tous les autres; en ce qu'il l'oblige, pour rendre solide la fortune d'un seul, de s'opposer à l'établissement de plusieurs; enfin, en ce qu'il détruit l'égalité des citoyens, qui en fait toute l'opulence. (Montesquieu, Lettres Persanes, let. 119.)

On the contrary, we are well convinced that much of the industry, and of the superior wealth and civilisation of modern Europe, may be ascribed to the influence of the custom of primogeniture in determining the succession to estates; and that, were it abolished, or superseded by the opposite custom of equally dividing landed property among all the children, or even among all the sons, they would suffer universally by the change, the youngest as well as the oldest; while it would most seriously compromise the interests of every other class.

It is consistent with the widest experience, that the possession, from infancy, of a competence, or even of a security against want, is, of all others, the most powerful obstacle to enterprise and industry. Those who enjoy it rarely seek to attain to any kind of distinction; but for the most part rest contented with the humble mediocrity in which they have been placed. Indeed, a principal objection to entails is, that they tend to foster indolent and dissolute habits in the eldest sons. But the system of equal succession, were it generally acted upon and sanctioned by public opinion, would have, in this respect, the like influence over an entire family that the law of entail has over a single child, that is, it would make three, four, or five spendthrifts instead of one. It would secure a comfortable provision to all those whose fathers were moderately wealthy; and it could not do this, without making them less industrious than they would have been, had they been left to shift for themselves, with only their education and a reasonable outfit; and without, also, making them less dutiful and obedient, and undermining and weakening the parental authority.* These conclusions

* See the remark of Burlamaqui, *antè*, p. 13.

appear so very obvious, that they can hardly fail to be generally assented to; and the inconveniences thus necessarily resulting from the equal division of inheritances, were, in fact, among the circumstances that contributed most powerfully to the adoption of an opposite practice. That such was the case is shown by Sir Matthew Hale, in his History of the Common Law, wherein he states that, "this equal division of inheritances* among all the children (sons) was found to be very inconvenient. For first," he says, "it weakened the strength of the kingdom; for, by frequent parcelling and subdividing of inheritances, in process of time they became so divided and crumbled that there were few persons of able estates left to undergo public charges or offices: Secondly, it did by degrees bring the inhabitants to a low kind of country living; and families were broken; and the younger sons, which had they not had these little parcels of land to apply themselves to would have betaken themselves to trades, or to military, or civil, or ecclesiastical employments, neglecting those opportunities, wholly applied themselves to those small divisions of lands; whereby they neglected the opportunities of greater advantage, of enriching themselves and the kingdom. And, therefore," &c. †

The Irish custom of gavelkind, though it differed widely in several important respects from the English, had this in common with the latter, that it caused the land to be divided into small portions, and made the population depend exclusively on it for support. The poverty and barbarism incident to such a state of society, have been forcibly depicted by Sir John Davis. "Again," says he, "that Irish custom of gavelkind did breed another mischief; for

* In the times antecedent to, and immediately following the Conquest.

† Chapter xi. p. 253. Runnington's edit. 1779.

thereby every man, being born to land, as well bastard as legitimate, they all held themselves to be gentlemen. And, though their portions were ever so small, and themselves ever so poor (for gavelkind must needs in the end make a poor gentility), yet they scorned to descend to husbandry or merchandize, or to learn any mechanical art or science. Besides, these poor gentlemen were so affected unto these small portions of land, that they rather chose to live at home by theft, extortion, and coshering, than to seek any better fortunes abroad." *

The custom of primogeniture, whatever defects may attach to it, is, at all events, free from these serious inconveniences. The eldest sons know that they have no indefeasible right of succession to the estates of their fathers; and, that if they misconduct themselves, they will run a considerable risk of being disinherited. It is obvious, too, that the desire to leave an estate unencumbered to the eldest son, without throwing the other children destitute upon the world, is a stimulus to industry and economy. It is not, indeed, to be expected, nor is it to be wished, that the monied fortunes accumulated for the younger

* Discovery of the True Cause why Ireland was never brought under Obedience, p. 130. ed. 1787.

The custom of gavelkind is still continued in Jersey, Guernsey, and the other Channel Islands, and its effects are there precisely similar to those stated above. The land is divided into small patches, varying from one and two, to ten acres, and seldom more. Its subdivision forms an invincible obstacle to the introduction of an improved system of cultivation. Potatoes, parsnips, and cabbages, are extensively grown, and furnish a large portion of the food of the people. The latter, notwithstanding their penurious habits, the valuable privileges enjoyed by the islands, and their advantageous situation for fishing and navigation, are for the most part exceedingly poor; and they are all but universally proud, litigious, and attached to routine practices. Much ground is lost by the numerous divisions between the different properties, and by the necessarily great extent of the roads.

children, should equal those of the elder brother. It is enough if they be furnished with the means of establishing themselves in a profession or in a business. In such case, the capacity to rise is put into their hands; and the sense, which they cannot but feel, of their inferiority in point of wealth as compared with the head of their house, is a motive to them to make extraordinary exertions, which would be wanting were their patrimonies equal to his. This circumstance is of material importance. If you would develop all the native resources of a man's mind, if you would bring his every faculty and power into full activity, you must make him aware of his inferiority in relation to others, and inspire him with a determination to rise to the same, or to a higher level. It is not to those placed by their fortunes at the head of society, but to those in its humbler walks who have raised themselves to eminence, that mankind are indebted for the greater number of those inventions and improvements which have so greatly extended the empire of mind over matter, and made such vast additions to the sum of human happiness. But, were large fortunes broken down by a system of equal partition, and reduced to a comparatively moderate level, the stimulus of inequality being wanting, or very much diminished, there would be less emulation, and society would come nearer to a stationary state. It is not always because a man is poor, that he is persevering, industrious, economical, and inventive: in many cases he is already wealthy, and is merely striving to place himself on the same level with others, who have still larger fortunes. But if that richer class did not exist, such persons would not have this spur to exertion, and would be satisfied when they had attained to the level of those around them. And hence it would appear irresistibly to follow, that were the custom of primogeniture superseded, and the estates

and properties of landed gentlemen equally divided, there would not be either so many or such powerful motives as at present, to tempt the younger sons to enter on the arena of ambition and enterprise with a determination to exert all their energies; and that, consequently, they would manifest proportionally less of that spirit.

It has been said, in favour of the equal division of property in land amongst the different members of a family, that such is the way in which the fortunes of merchants and manufacturers, and, generally, of the commercial and monied classes, are distributed, and that no bad effects have resulted from it. But there is little analogy between the cases. The children of a merchant or banker, who have equally divided the paternal property, may, without changing their mode of life, carry on the business in partnership as advantageously as their father. The children of a landed proprietor can hardly do this. Even should the portions of the paternal estate falling to the share of each after its division be too small to admit of their being separately farmed with advantage, the difficulties in the way of their being let or farmed for their common advantage, originating in the different and conflicting views of the co-heirs, are usually found to be all but insurmountable. In most cases, indeed, in which estates are divided by will, the paternal home is deserted by all but the eldest son; and there is, speaking generally, as many private mansions and families as there are children; at the same time, that the younger children are deprived of the peculiar stimulus to industry by which they would have been influenced, had the estate descended to the elder brother, and their fortunes been less than his. We should mistake, however, if we supposed that the advantage of preserving large estates from being frittered down by a scheme of equal division, is limited to its influence over the

children of their owners. Their magnitude raises universally the standard of competence, and gives, by doing so, new force to the springs which set industry in motion. The manner of living among the great landlords, is that in which every one is ambitious of indulging; and their habits of expense, though sometimes injurious to themselves, act as powerful incentives to the ingenuity and enterprise of the other classes, who never think their fortunes sufficiently ample, unless they will enable them to emulate the splendour of the richest landlords; so that the custom of primogeniture renders all classes more industrious, augmenting, at the same time, the mass of wealth, and the scale of enjoyment.

It is alleged, indeed, that this eager pursuit of wealth, and the engrossing interest which it inspires, occasion everything to be undervalued that does not directly conspire to its advancement, and makes the possession of money be regarded as the only thing desirable. This, however, is a very exaggerated and fallacious representation. It is not meant to say, that a desire to outstrip one's neighbour in the accumulation of wealth, is the best motive to exertion; or, that it might not be far preferable, could the same spirit of emulation be excited by a desire to excel in learning, benevolence, or integrity. There would, however, appear to be but little reason for thinking that the love of superiority in mental acquirements, or in the social virtues, will ever be able to create that deep, lasting, and universal interest, that is created by a desire to mount in the scale of society, and to attain to the same elevation, in point of fortune, that has been attained by those at its summit. But it is false to affirm, that the prevalence of this spirit causes the virtues of industry and frugality to be cultivated to the exclusion of the others. Every one, indeed, acquainted with

what is going on around them, must know that such is not the case. The business of those who inherit considerable fortunes, is rather to spend than to accumulate; and while, on the one hand, the desire to attain to an equality of riches with them is a powerful stimulus to industry, the manner of living, which they render fashionable, prevents, on the other, the growth of those sordid and miserly habits that are subversive of every generous impulse. Many holders of large fortunes, and many who are still striving to attain that distinction, influenced partly, no doubt, by vanity and ostentation, but in a far greater degree by worthier motives, are the liberal patrons of the arts, and are eminently distinguished by their benevolence. The example thus set by the higher ranks, reacts on those below them; being communicated from one class to another, until it pervades the whole society. And hence, the universal diffusion of a taste for elegancies and refinements that prevails in this country. An individual who has 3,000*l.*, 5,000*l.*, or 10,000*l.* a year to spend, can hardly fail, do what he will, to supply subsistence to a great many most ingenious persons. A limited income must be laid out on necessaries, and the least expensive description of conveniencies. But a small portion only of a large income is so expended, the greater portion being laid out on the improvement of lands and houses, and in the purchase of books, pictures, statues, costly furniture, and a thousand other things, the demand for which supports and stimulates the various arts that refine, dignify, and embellish society. A high degree of civilisation, or of proficiency in liberal studies and pursuits, is never found except in company with large private fortunes. The latter are indispensable to the existence of the former. Poor countries, or countries principally occupied by small proprietors, or where there are but few wealthy people, are

always comparatively barbarous. The manners and tastes of their inhabitants are rude and coarse; and they are destitute of many of the comforts and enjoyments that give to civilised life its chief value. The way to improve a nation, is to spread among the people a taste for all sorts of superior accommodations, and to animate them with a strong desire for their attainment. And this is best done by such a system as ours. The custom of primogeniture, by providing for the accumulation of property and its perpetuity in families, provides, at the same time, for the cultivation of all that is most elevated in art, in literature, and in science, of everything in fine that gives splendour and an enduring celebrity to nations. While it does this, it imbues all classes with the spirit of enterprise and industry. And by making each individual depend on others for a large share of his comforts and enjoyments, it binds society together, and interests each in the others' well-being. The tenants and tradesmen of a great lord, are as necessary to him as he is to them. In a country like this nothing is separate or independent. And hence, though the spirit of emulation, industry, and invention, be stronger here, perhaps, than anywhere else, it has not obliterated, but seems, on the contrary, rather to have strengthened, the social and generous sympathies.

We shall, perhaps, be told, that the conduct of parents should not be influenced by these considerations; that it is their duty to look to the interests of their families, rather than to those of the public; and that, provided the merits of their children be equal, they are bound to treat them with the same love, favour, and affection. It is doubtful, however, whether a man be justified in governing any part of his conduct solely with a view to his own interests, or those of his family, without reflecting on the probable influence of such conduct on the public. "*Cari sunt*

parentes, cari liberi, propinqui, familiares: sed omnes omnium caritates PATRIA UNA COMPLEXA EST: *pro qua quis bonus dubitet mortem oppetere, si ei sit profuturus?*"* But without insisting on these considerations, it is enough to state, that it is contradictory to pretend that a course of conduct advantageous to the public, can be injurious to families. An individual who has a proper sense of what he really owes to his children, will follow, in the distribution of his fortune, that course which he may consider, all things taken into account, as the most likely to promote their lasting interests, and to make them valuable members of society. And, except where the family consists wholly of daughters, there are comparatively few cases in which this object will be best secured by the equal division of his property. If a fortune be inconsiderable it is immaterial how it is left. But if it be considerable, and, especially, if it consist wholly or principally of fixed property or land, its equal division would be hostile to the interests of a family of sons, or of sons and daughters. By securing to each a competence, it would, as already seen, be prejudicial or fatal to their enterprise and industry; and might, and probably would, be an all but insuperable obstacle to their rising in the world and distinguishing themselves. But when the bulk of the fortune is left to the eldest son, he becomes a head, a refuge, and a rallying point to the family; while the others are placed under the circumstances best fitted to ensure their advancement. It is false to affirm, that the interests of the younger sons are sacrificed by such an arrangement. On the contrary, they are most efficiently promoted. A man who has 400*l.*, 500*l.*, or 1,000*l.* a year, of fixed income, is in a more secure position than one who has nothing to look to but

* Cicero De Officiis, lib. i. c. 17.

his chances of success in some department of art, science, or industry. But we have no ground or warrant for affirming that the former is the happier, or in the better situation of the two. He may be, and probably will be, satisfied with the income that has been left him. But there are other pleasures than those incident to a passive, semi-torpid existence. It would be a libel on Providence to suppose, that the *fruges consumere nati* have a monopoly of happiness: —

Cui sit conditio dulcis sine pulvere palmæ?

Vigorous exertion is not only, in the vast majority of instances, indispensable to success in life, but it is in itself, and independent altogether of other considerations, a principal good. And, if it be really true that intensity of pursuit conduces more to enjoyment than anything else, how can the observance of a custom or law which tends most to inspire that intensity, be censured on the part of parents? A man is bound, in looking to the interests of his family, to consider them in a remote, as well as in an immediate, point of view. It may, on a hasty or superficial glance, appear unjust that a father should give 10,000*l.* to one son, and only 1,000*l.* to another. But the chances are, had he divided the 11,000*l.* equally between them, that he would, by giving them the means of subsistence, have taken away, or greatly weakened their desire to amend their situation; whereas, by distributing it as he has done, he makes one son comparatively comfortable, and puts the other into a situation in which, while he is compelled to exert himself, he has before him the numberless prizes that reward successful exertion; and the hope of carrying off some portion of these, even though it should not be realised, inspires him with a zeal that makes exertion a positive pleasure.

Parents who act in this way, who make their eldest sons country gentlemen, and the others lawyers, physicians, divines, soldiers, merchants, artists, and adventurers of all sorts, follow that course which is most for the advantage of their families and of the public. They cannot with any show of reason be taxed with injustice to any portion of their children. By varying their patrimonies and professions, they elicit whatever talents they may possess, and take effectual means to make them enterprising, and to secure their attaining to distinction.

It has sometimes been contended that the custom of primogeniture is injurious, from its interesting the leading families of the country in the support of expensive public establishments, in which their younger branches are most commonly placed. There is, however, no institution in which some defects may not be discovered; and, admitting that the custom of primogeniture gives the nobility and gentry the bias alluded to, that would be but an inconsiderable set off against its many advantages. But this bias, if it really exist, is little perceptible. In so far as the administration of justice is concerned, the younger branches of great families have evinced no very particular anxiety to encroach upon the many lucrative situations which it affords. These have always been wholly, or almost wholly, filled by individuals from the middle and lower ranks of society. And yet there can, we apprehend, be no manner of doubt, that the administration of justice is more encumbered with useless forms, unnecessary places, and overgrown salaries, than any other department of the public service; and that these abuses are the most difficult to eradicate. The advantages held out by the army and navy are certainly, in a pecuniary point of view, far from alluring. The retiring pension of some unknown

legal functionary, frequently amounts to more than half the full pay of the officers of a regiment, or of a line-of-battle ship. And had the bias alluded to above been so strong as has been represented, it is rather singular that some more strenuous efforts should not have been made by the higher classes, to augment the scanty and inadequate pay of the officers in the military and naval service. Much has also been said about situations in the colonies; these, however, were not originally acquired in order to provide situations for any particular class, but to extend commerce; and, at this moment, if perhaps we except a few of the higher situations, the others are as commonly filled by the sons of manufacturers and merchants as by those of the landed gentry. And, supposing that the existing outlets for the latter, in the army, navy, and church, were narrowed, it would merely oblige a greater number of them to enter upon the more lucrative pursuits of commerce and manufactures; a change which, whether advantageous or not to others, would be any thing but injurious to themselves.

It does not, therefore, appear, that the objections commonly made to the custom of primogeniture, are entitled to any considerable weight. It would be different were the succession of the eldest sons to land, and other fixed property, imperative; but it is a *custom* only, and not a right; and may, in the event of their misconducting themselves, be defeated by testament. And when thus limited, it seems to be incomparably better fitted than the scheme of equal division, to promote the well-being of society, and to be peculiarly entitled to the indirect sanction given to it by the law in regard to intestacy.

By this law it is ruled, that the personal property of a person dying intestate, shall be divided (deducting the widow's

portion, if there be one,) equally among all the children, but that the real estate shall go, in addition, to the eldest son. Now, as everybody possessed of property has power to leave it by will to such heirs as he may prefer, the presumption is, if he die without availing himself of this power, or making a will, that he approves of the destination which he knew the law would make of his property.* And we have endeavoured to show, and we hope successfully, that this destination is, all things considered, that most conducive to the public interests. Hence, if the younger branches of the family of an intestate individual, happen to suffer from the distribution of his estate, the blame does not really attach to the law, but is plainly ascribable to the intention, or the carelessness of the father. It is said, indeed, that the law might be varied so as to distribute all sorts of intestate property equally among the children, without interfering with the power of willing, or, consequently, with the general prejudice in favour of the custom of primogeniture. But, though it might not interfere directly with this custom, such a change would necessarily subject it to a very powerful indirect influence. It would be a distinct declaration, that the legislature approved of the system of equal partition; and the example, set by the collective wisdom of the nation in regulating intestate successions, would, no doubt, be followed by many; and might eventually lead to its being generally acted upon. But we have seen, that any such change would be in no ordinary degree inimical to those national interests which the legislature is especially bound to protect. We do not deny, that occasional instances of hardship occur under the present law of intestacy. This, however, is a consequence which no care can prevent. Laws either are,

* Montaigne contends that this is generally the wisest course to follow. (Essays, vol. ii. No. 8.)

or should be, framed to promote the well-being of the great bulk of those subject to their operation; and they neither are, nor can be suited to the exigencies of a few anomalous cases. Generally speaking, the interests of the families of persons dying intestate, differ in no respect from those of families who inherit under wills in accordance with the custom of primogeniture. And, in our view of the matter, it would be most inexpedient to interfere with the latter.

In one respect, however, the law of intestacy appears to stand much in need of revision. It is interpreted so as to give in many cases more to the eldest son than the real estate and his share of the personalty. Suppose, for example, that a person dies intestate, leaving an estate worth (say) 100,000*l.*, with a mortgage made by him upon it for half its value, or 50,000*l.*, and leaving, also, 50,000*l.* of personal property: in this case the real estate is obviously worth only 50,000*l.*; and, consistently with the principles previously laid down, the eldest son should succeed to the estate burdened with its debt, and the personal property be divided among the children generally. But a different rule has been permitted to grow up. The personal property of persons dying intestate is the first fund for their debts, although secured upon their estates; and it is the surplus only, if there be any, after these debts are paid, that is divisible among the children, who, in the above case, would be entitled to nothing. This appears to be, in all respects, a most objectionable arrangement. An estate with a mortgage upon it is equivalent merely to a smaller estate free from debt; and whatever the surplus may be, under deduction of such mortgage or other debt, that is obviously all that is at the disposal of, or can be regarded as the property of its nominal owner; and when such owner dies intestate, the surplus referred to is all to which, on principle, his eldest

son should be entitled to succeed. Hence, in cases of succession *ab intestato,* estates should always carry with them the debts with which they are charged. There are but few instances of estates being burthened to their full value; and when such cases do occur, the true conclusion is that the intestates have left no fixed property; and that, consequently, the eldest sons have nothing to look to save their share of the personal property. This, we may add, is the law of Scotland. In it the personal property of intestate parties is never applied to the payment of debts secured by mortgage upon their estates: the obligations, as well as the estates, descend to the eldest sons.*

* In other respects the Scotch law of intestacy is also less favourable to the eldest son than the English. Under the latter, the eldest son, in addition to the land or other real property of his father, gets the same share as the younger children of his personal property. But in Scotland, if the eldest son take the real, he gets no part of the personal estate. He is, however, permitted to renounce the succession to the former, and to have it valued and included in a common fund with the movable property, of which he may demand an equal share with his brothers and sisters. In the event of the fixed property being inconsiderable as compared with the movable, the eldest son usually avails himself of this option.

CHAP. III.

Origin of Entails. —Character and Influence of the Systems of Entail established in England and Scotland.

THE power to devise property by will is generally either extended beyond those limits which seem to be most advantageous, or compressed within a considerably narrower range. Thus, the recognition of the right to bequeath property to any particular heir, has been followed, in various countries, by the recognition of the right of the owners of estates to subject them to *entails;* that is, to devise them to a limited or, it may be, an unlimited series of heirs, none of whom shall have power to alienate the property, or to burden it with debt, but who shall merely possess it in the capacity of life-renters. In other countries, again, a return has been made towards the more ancient practices; and the power to devise property by will has been much restricted. The principles previously established are sufficient, perhaps, to enable an estimate to be formed, on general grounds, of the probable operation of these systems. But as they are widely acted upon, exercise a powerful influence over those among whom they are respectively established, and have given rise to the most contradictory theories and statements, it is necessary to look rather closely into the arguments for and against them, and at their practical results.

The history of entails is involved in a good deal of obscurity. According to Adam Smith, "they were

introduced to preserve a certain lineal succession, of which the law of primogeniture first gave the idea, and to hinder any part of the original estate from being carried out of the proposed line, either by gift, or devise, or alienation; either by the folly, or by the misfortune of any of its successive owners." (p. 171.) He adds, "They were altogether unknown to the Roman law;" and in this assertion he is supported by Gibbon. "Each Roman," says the historian, "of mature age and discretion, acquired the absolute dominion of his inheritance; and the simplicity of the civil law was never clouded by the long and intricate entails which confine the happiness and freedom of unborn generations."* But, though it may appear not a little presumptuous to dissent from such authority, there seem to be solid grounds for doubting the accuracy of this statement. Man is never satisfied either with riches or privileges. When the right to bequeath property to any particular heir has been recognised, the ideas of its possessors are proportionally enlarged. They endeavour to add to the power they have acquired; and claim the right to specify their future as well as their immediate heirs, and to lay down the conditions under which their fortunes shall be always enjoyed. If they succeed in this, their authority is, as it were, prolonged beyond the grave; and their vanity and self-love are flattered by the consciousness that they are perpetuating their possessions, and influencing the fate of distant generations.† It would have been singular, indeed, had the Romans been strangers to these feelings. This, however, was not the case. Property, it is true, could not be directly entailed under

* Decline and Fall, c. xliv.

† Ben fù detto, che l' uomo è l'animale della superbia. Ecco come egli vuol commandare anche dopo morte, anche per secoli e secoli: quando egli è sotterra. (Muratori, Difetti della Giurisprudenza, c. 17).

the Roman law; but it was done indirectly by the intervention of fiduciary, or trust settlements (*fidei commissa*). These were contrived, partly to enable property to be conveyed to those to whom it could not be left directly; and partly, to retain it in the line of succession pointed out by the individual making the settlement. In the later ages of the empire, it was customary to insert prohibitive and irritant clauses in settlements intended to effect the latter object, similar to those inserted in modern entails; and being sanctioned by law, they effectually tied up, or secured, the property to which they applied, in perpetuity, to the specified heirs. Justinian, however, who was hostile to perpetuities, limited the duration of such settlements to *four* generations, including that of their authors.*

The circumstances already noticed as having led to the universal establishment of the custom of primogeniture in modern Europe, necessarily, also strengthened, as Adam Smith has stated, the desire to perpetuate the succession to property in the same families. They did not give rise to the practice of entailing, but they no doubt gave it a great extension.†

* We subjoin a specimen of a Roman entail, remarkable for its brevity, comprehensiveness, and distinctness:—*Volo meas ædes non vendi ab hæredibus meis neque fœnerari super eas; sed manere eas firmas simplices meis filiis et nepotibus universum tempus. Si autem aliquis eorum voluerit vendere partem suam, vel fœnerari super eam, potestatem habeat vendere cohæredi suo, et fœnerari ab eo; si autem aliquis præter hæc fixerit, erit quod obligatur inutile atque irritum.* (Digest, lib. xxxi. c. 88. § 15.)

We find in Leeuwen's edition of Gothofred's Corpus Juris (p. 448.) the following note on the words *universum tempus*, in the above entail: —*Substitutiones perpetuæ et in infinitum, jure civili approbatæ, ut hic. Hodie inter quartum gradum restrictæ.* Nov. 159. See also Sandford on Entails, p. 12. 2d ed.

† The right of primogeniture is noticed in the compilation

It was customary in England from an early epoch to settle estates upon individuals and their issue under certain conditions and limitations.* But the ingenuity of the lawyers having succeeded in discovering means by which they might be evaded, the statute of Westminster the Second, the 13th Edward I. c. 1., entitled *De Donis conditionalibus*, was enacted to obviate such evasions. It established a system of perpetual entail, by prohibiting the alienation of land given under condition, and declaring that in the event of the failure of the issue of the donee, it should revert entire to the donor or his heirs. This statute was planned by the greater barons to prevent, not the alienation merely, but also the forfeiture of their estates, which in these unsettled times was an important object. An attainder could only occasion the forfeiture of the property belonging to the person attainted, or such as he was entitled to alienate. Hence, when effect was given to entails, the person in possession of an estate being reduced to the condition of a life-renter, it went at his demise, notwithstanding his attainder, to the next heir. This statute, which was passed in 1285, continued in force for above two

entitled the Laws of Henry I., No. 70, already referred to (*ante*, p. 9.), where it is ordered that the eldest son shall take the principal fief. *Primum patris feodum primogenitus filius habeat.*

* "Amongst the Anglo-Saxons," says Mr. Spence, "land might be given for life, or for years, or upon condition, or it might be limited to the descendants of the granter, and rendered inalienable by them." (Inquiry into the Origin of Laws, &c. in Modern Europe, p. 392.) The learned gentleman refers, in proof of this statement, to the law of Alfred, No. 41., which has since been published, with a translation, in the valuable work (p. 39.) compiled by Mr. Thorpe, on the Ancient Laws and Institutions of England. Mr. Spence farther surmises, that the statute (*De Donis conditionalibus*) referred to in the text, was in part, at least, an attempt to revive the ancient laws for preserving the heritage in the same family. (Inquiry *ubi supra;* see also the Equitable Jurisdiction of the Court of Chancery, i. 141. by the same author.)

hundred years. It was, however, productive of various mischievous consequences. "The inconvenience thereof," says Bacon, "was great, for by that means the land being so sure tied upon the heir as that his father could not put it from him, it made the son to be disobedient, negligent, and wasteful; often marrying without the father's consent, and to grow insolent in vice, knowing, that there could be no check of disinheriting him. It also made the owners of the land less fearful to commit murthers, felonies, treasons, and manslaughters; for that they knew none of these acts could hurt the heir of his inheritance. It hindered men that had entailed lands, that they could not make the best of their lands by fine and improvement, for that none upon so uncertain an estate as for term of his own life would give him a fine of any value, nor lay any great stock upon the land, that might yield rent improved. Lastly, those entails did defraud the Crown, and many subjects of their debts; for that the land was not liable longer than his own lifetime; which caused, that the King could not safely commit any office of account to such whose lands were entailed, nor other men trust them with loan of money." *

It will be afterwards seen that entails may be contrived so as to prevent the alienation of property, and to secure its continuance in a given line, without having some of the more objectionable consequences noticed by Bacon. But, despite their influence, the security which the entails now referred to, gave to the estates of the nobility against forfeiture, hindered the latter from consenting, either to the repeal or modification of the statute of Edward I. Although, however, it was not interfered

* See the Treatise on the Use of the Law. (Bacon's Works, iv. 73, ed. 1730.) Blackstone has paraphrased this passage. (Commentaries, book ii. cap. 7.)

with by the legislature, its modification was in the end effected by a contrivance, or, as Blackstone has termed it, a *pia fraus* of the courts. Edward IV. having concluded that attainders for high treason had comparatively little influence in securing the allegiance of families whose property was protected from forfeiture by entails, gave effect to the decision of the lawyers who had fallen upon a device for breaking them, by a judgment in a feigned suit, called a *recovery*. The inroad that was thus successfully made on entails, was followed up by others in the reigns of Henry VII. and Henry VIII. And the principles and rules thus introduced, have been simplified and carried still farther by the late acts, the 3 & 4 Will. IV. c. 74., and the 1 & 2 Vict. c. 110. A more complex mode of entailing, or, as it is usually called, settling estates, has, however, been introduced, and supported within certain limits, by the courts of law. And, without entering into minutiæ, it may be laid down in general terms, that at present either real or personal property may be settled or entailed so as to be inalienable for a life, or for any number of lives in being, and for twenty-one years thereafter. In other words, an English gentleman may entail an estate on any heir, or series of heirs, during the longest life of certain parties named, or clearly specified in the deed, and alive when it was made, and till twenty-one years after the death of the last surviving nominee. It is immaterial whether the parties taken as nominees, be parties on whom the estate may or may not devolve. On the expiration of twenty-one years from the death of the last nominee, the destination stops, and the estate may be disposed of by an ordinary deed of conveyance without resorting to the indirect expedient of a fine, or a recovery, which is now abolished (3 & 4 Will. IV. c. 74.). It is further to be observed that, though the specified heirs cannot alienate

the estate or encumber it with debt (except to the extent of their own interest therein), they are usually permitted, by powers given in the settlement to that effect, to grant leases which are good against their successors; and sometimes also to make exchanges and even sales of property, under condition of the price being re-invested in other lands.

Leases of lands under entail or settlement may vary in every possible way according to the "powers of leasing" embodied in the deeds, and the views of the parties in possession of the estates. It would be well, however, seeing the great extent of property under settlements, and the importance of the terms and conditions in leases being well-defined and unsusceptible of challenge, that something were done to clear up and simplify this portion of the law. If the power to grant leases valid against successors be omitted in a settlement, it cannot be supplied by implication, or otherwise than by an act of the legislature, which is too expensive a resource to be thought of except in cases of importance. It is necessary, also, to the protection of the heirs of those granting leases of lands under entail, as well as of remainder-men and others having a more remote interest in them, that the powers of leasing in settlements should not be abused; and it is farther necessary for the public interests that leases should be of a duration, and should embody conditions, fitted to attract capital to the land, and to stimulate the industry of the tenants. The best way, perhaps, of attaining these important objects, of obviating disputes, and of giving that assured possession to the occupiers that is so desirable, would be for the legislature to enact some general rules in regard to the powers of leasing under settlements, and to define the limits within which they might vary. There is no insu-

perable difficulty to hinder this being done; and were the rules judiciously devised and carried into effect, their influence would be most beneficial, by getting rid of the doubts and litigation which so frequently arise at present in the interpretation of "powers," and by preventing or discouraging impolitic and absurd conditions in leases.

But these, however important, are subordinate considerations, and if we might hazard an opinion on such a point, we should say that, in a general point of view, but little seems to be required for the improvement of the English law of entail. Were provision made for the registry of entails, and schedules of settlements or deeds of entail (defining, among other things, the power of leasing), to which parties should be bound to conform, issued by the legislature, it would perhaps have received all the perfection of which it is susceptible. It seems to have hit the medium most desirable to be attained for reconciling conflicting interests, by giving individuals that degree of power over the disposal of their property, which is necessary to inspire them with the strongest desire to accumulate a fortune; at the same time that it takes from them the power of naming an indefinite series of heirs, and of fixing the conditions under which their property shall be always enjoyed.*

It is possible, by taking a considerable number of young

* This, also, is the opinion of the ablest modern lawyers. "The limits," says Mr. Butler, "within which the English system of the settlement of property confines the restraints on alienation, prevent the subtraction from commerce of an undue proportion of the national wealth, and leave as much of it for circulation as is sufficient to answer the wants of those who are disposed to purchase; and while a perpetual entail is avoided, such an entail may be framed as will effect all those provisions which it is consistent with the limited reach of human prudence to design; and when the entail is discharged it

parties into the deed as nominees, to make entails effectual for a century or more; but this is not often done, and fifty or sixty years may, perhaps, be assumed as their usual average duration. And though thus limited, the system, with the aid of marriage settlements, and such like devices, materially assists in perpetuating property in certain families. And in so commercial and manufacturing a country as this the permanency of landed property in the same families, and the consideration which they derive from their antiquity, as well as from their wealth, appear to have a highly beneficial influence. Whatever widens and strengthens the basis of the aristocracy, without conferring upon it invidious, or injurious, or oppressive privileges, makes it the better able to resist and moderate those sudden and dangerous impulses by which the population of towns is so apt to be actuated; and thus, while it powerfully contributes to the public security and tranquillity, it gives greater weight, consistency, and sobriety, to public opinion. We shall, indeed, immediately endeavour to show, that, in furtherance of the objects now glanced at, the estates (or certain portions thereof) of noble families might be advantageously converted into *majorats*, or subjected to perpetual entails. But, looking at the present English system of entail in a general point of view, or as having reference to all ranks and orders of the community, it appears to be eminently well fitted to promote the public interests.*

most frequently happens that the rights or views of the parties interested in the property lead wholly or partially to a renewal of the entail; and thus, while individuals have the means of effecting reasonable arrangements, that succession of respectable proprietors is preserved, which conduces so much to public and private happiness." (Quoted by Mr. Lewis in his Treatise on the Law of Perpetuity, p. 5.)

* Entails were limited in France, by an Ordinance, compiled by the illustrious chancellor D'Aguesseau, issued in 1747, to two degrees

The practice of entailing in its present form, originated in Scotland at a comparatively recent period, the earliest entail now on record being that of the estate of Roxburgh in 1648.* This was soon followed by others; though as these entails were made at common law, and were not protected by any statute, doubts were entertained whether they were really effectual. In 1662, the question of their validity was raised in the Court of Session, an action being tried in the course of that year, which had for its object to set aside an entail. And though this action was not successful, the court having by a narrow majority sustained the entail, some of the ablest lawyers were not convinced of the soundness of the decision, so that little confidence was placed in this novel description of deeds. In 1685, however, these doubts were finally dispelled; an act of that year, the 1 Jac. VII. c. 22., having established

between the entailer and the heir, reckoned by the individuals in whom the substitution vested. But this precedent is of no value: for the legislative power of the nobles as well as of the commons of France having been destroyed, it was of little consequence to the public whether great families fell into depressed circumstances; and the court must have been rather well pleased that such should have been the case, as it rendered them more dependent, and consequently, also, more subservient to its views.

* Sir John Dalrymple mentions an instance, so early as 1489, of a deed with a prohibitory clause *de non alienando*; but that was a solitary instance, for then, and for a lengthened period thereafter, nothing more was meant by an entail in Scotland than a conveyance altering the course of succession from heirs general to heirs male. In the course of time, however, various devices were resorted to in the view of preventing alienation and the contraction of debt; which terminated, about the middle of the 17th century, in the introduction of entails with irritant and resolutive clauses. The validity of the latter was, as stated above, tried in 1662. In later times, however, it has been universally held that the case now referred to was wrongly decided; and that entails had not a foot to stand upon till the act of 1685. (Dalrymple on Feudal Property, 3rd ed. p. 170.; Sandford on Entails, p. 39., &c.)

the practice of entailing on a solid foundation. It reduced heirs of entail to the condition (nearly) of tenants for life, and gave entailers power to regulate the perpetual destination of their property, subject only to the obligation of enrolling the entail, with its various clauses and provisions, in a public register, there to remain (such are the words of the act) *ad perpetuam rei memoriam.* (See this Act in APPENDIX.)

This act seems to have been intended, like the English act of Edward I., or more even than it, not merely to prevent the alienation of the property of those executing entails, but also to protect it from forfeiture. At the period when it was passed, Scotland was subjected to the most revolting despotism. Lives and estates were held at the mere pleasure of the crown. Acts, that had previously been considered as innocent, or as constituting only a very venial offence, were declared treasonable; statutes were enacted with clauses having a retrospective operation, and intended to strike at individuals who had done nothing cognisable by any existing law; while, had the other engines of tyranny been insufficient, the servility of the judges rendered it impossible for any one to escape, against whom the crown lawyers instituted a prosecution. Hence the fact, which might otherwise appear incredible, that the estates of parties about to be tried were frequently made over by the Crown to others before their trial took place, in anticipation of the result! Under these distressing circumstances, the "Estates" were glad to adopt any device that promised to give them greater security, that their properties would escape the forfeitures to which they were so much exposed: and in this view, as well as in the view of preventing their alienation, they passed the above act, with a tacit belief

that a forfeiture would affect only the life interest of the possessor of an entailed estate, and that on his death it would descend to the next heir.*

That this was the principal object in view is plain from the fact, that no sooner had the Stuart dynasty been overthrown, than a statute was passed (Act 1690. c. 33.), which expressly exempted entailed estates from forfeiture; on the ground, as stated in the preamble, that "it is just that every man suffer for his own fault, and not the innocent with, or for the guilty; and that such rights as are not in a man's power to alienate by consent, he should not confiscate by his crime."

But this law kept its place on the statute book only for a short period. At the Union it was judged expedient that the law with respect to high treason in Scotland, should be assimilated to that of England, and that the punishment for the crime should be the same in both kingdoms. Now, the law of England has ruled that an individual who commits treason forfeits an entailed estate for himself and his heirs, but without prejudicing the interests of those called remainder-men; and the House of Lords, by a judgment in 1747, put a large class of what are denominated in Scotland substitute heirs of entail, on the footing of remainder-men in England.

The forfeitures occasioned by the rebellions of 1715 and 1745, having powerfully attracted the public attention to the subject, the equity and policy of the rule established by the statute of Anne, were freely canvassed. It was defended with equal talent and ingenuity by Mr. Charles Yorke, in his celebrated tract, entitled, "Considerations on the Law of Forfeiture for High Treason." But, despite the deference due to his reasonings and authority, we

* Laing's History of Scotland, vol. iv. p. 166. 3d ed.

are inclined to think that the rule in relation to forfeiture, laid down in the Scotch act of 1690, is more consistent with the nature of a perpetual entail, and, also, with justice and sound policy, than the rule substituted in its stead. This, however, is a point which it would require too much space to discuss; and which is, besides, in great measure foreign to the subject of this work.*

The system of entail established by the act of 1685, has been continued ever since without any modification of its main principles, and has been very extensively acted upon. It appears from the register, that previously to that year only twenty-four entails had been executed in Scotland, but the practice has since gained ground progressively, and rapidly. There were recorded between

1685	and 1705	79	entails.
1705	— 1725	125	—
1725	— 1745	158	—
1745	— 1765	138	—
1765	— 1785	272	—
1785	— 1805	360	—
1805	— 1825	459	—
1825	— 1845	400	—

The progress of the system since 1830 has been as follows: —

* Mr. Yorke's tract may be said to be a commentary on the text of Cicero. "*Nec vero me fugit, quam sit acerbum parentum scelera filiorum pœnis lui: sed hoc præclare legibus comparatum est, ut caritas liberorum amiciores parentes reipublicæ redderet.*" (Ep. 12. ad Brutum.) But the reasonings of the learned gentleman would have been more conclusive had he taken Moses for a guide. "The fathers shall not," says the Jewish legislator, "be put to death for the children, neither shall the children be put to death for the fathers; every man shall be put to death (or shall answer) for his own sin." (Deuteronomy, xxiv. 16.)

Years.	Entails.	Years.	Entails.
1830	23	1839	29
1831	24	1840	28
1832	32	1841	19
1833	26	1842	25
1834	20	1843	20
1835	20	1844	26
1836	25	1845	25
1837	19	1846	30
1838	24		
		In all	414

It appears, from these statements, that 2,046 deeds of entail have been recorded since 1685. But we are not thence to conclude that there are at this moment 2,046 subsisting entails. That is the total number of deeds of all descriptions having reference to entails which appear upon the register; but a considerable number of these deeds refer to entails that have since terminated, or been set aside; others again are deeds of revocation or explanation, deeds relating to the exchange of entailed for unentailed lands, &c.

There are no means by which to learn the exact proportion of the landed property of Scotland subject to entail. Dr. Smith, and, previously to him, Sir John Dalrymple, estimated the entailed lands at about a fifth part of the whole. But the foregoing table shows, that the number of entails has been nearly trebled since 1785; and it is most probable that at present (1847) a full half or more of the land of Scotland is entailed. In corroboration of this estimate, it may be mentioned, that in the General Report of Scotland, published in 1814, it is stated that while the valued rent of Scotland amounts to 3,804,221*l.* Scotch, the valued rent of the estates under entail amounted to 1,213,279*l.* Scotch. According, therefore, to this

statement, it would appear, that in 1811, the period to which it refers, about a third part of the land of Scotland was entailed; and as a great number of entails have been executed since 1811, it may be safely concluded that the lands under entail exceed at this moment a half of the whole.

Attempts have been made at different times to effect some change in the present law of entail. In 1764, the Faculty of Advocates, after agreeing by a large majority (forty-three to four) to resolutions against it, drew up the heads of a bill for restraining entails, on a plan suggested by Lord Kames, which, had they been embodied in a statute, would have placed the Scotch system of entail nearly on the same footing as the English. The project excited a good deal of discussion at the time; ultimately, however, it fell to the ground, and no vigorous effort has since been made to check the practice. Additions are daily made to the lands under entail; and in many large and populous districts there is hardly an acre to be found not burdened with its fetters.

The law of entail is said by lawyers to be founded on the maxim of the civil law, that every one has a natural right absolutely to dispose of his own property, *unusquisque est rei suæ moderator et arbiter.* But natural rights may safely be left out of view in the discussion of this question. The power of making settlements and testamentary dispositions of property after death, is a purely civil right, and is every where conceded, regulated, and limited by law.* We are not therefore, to decide,

* *Testamenti factio non privati sed publici juris est.* (Digest, lib. xxviii. tit. i. § 3.) Le partage des biens, les lois sur ce partage, les successions après la mort de celui qui a eu ce partage: tout cela ne peut avoir été réglé que par la société, et par conséquent, par des

in regard to the policy or impolicy of entails, by referring to abstract or imaginary principles, but by an examination of their real operation and practical influence over society. In this, as in all similar cases, we must defer to the test of utility*, as ascertained by a comprehensive experience; that is, we must carefully compare the advantages and disadvantages resulting from the practice of entailing, and decide for or against it as we find the one or the other predominate. The following seem to be amongst the principal topics to be attended to in making this comparison.

In the first place, it is alleged in favour of entails, that they stimulate exertion and economy; that they hold out to industry and ambition the strongest and safest excitement, in the prospect of founding an imperishable name and a powerful family, and of being remembered and venerated by endless generations, as their chief and benefactor: and, in the second place, it is said, that entails form the only solid bulwark of a respectable aristocracy, and prevent generations from being ruined by the folly or misfortunes of an individual.

In regard to the first of these allegations, it is not to be doubted that the desire to found a family, and to secure property accumulated in a long course of laborious and successful exertion, from being squandered by the inconsiderate projects or extravagance of any future individual, will act upon most persons as a powerful incentive to industry and economy. But the beneficial influence of the system, in this respect, does not extend beyond the entailer, or the original founder of the family. Its operation on the subsequent holders of the property is entirely different. An heir

lois politiques ou civiles. (Montesquieu, Esprit des Loix, liv. xxvi. c. 6.) See also Blackstone, Book ii. c. 32.

* Ipsa utilitas justi prope mater et æqui. (Hor. 1 Sat. iii. 98.)

of entail is in great measure emancipated from the influence of parental authority. His chance of succeeding to the property of his fathers does not depend on his having deserved it; on his being dutiful or undutiful, dissipated or sober. The succession to entailed estates is not regulated by the principle of *detur digniori*, nor by the custom of primogeniture. Their occupiers have no power to change the established order of succession; they cannot exclude the worst to make room for the best of their sons; but must submit to see the properties of which they are in possession descend, as is sometimes the case, to the least deserving of their children or relations. Granting, therefore, that the institution of perpetual entails has a tendency, as it undoubtedly has, to make one generation active, frugal, and industrious, it is clear it exempts every succeeding generation, that is, every succeeding heir of entail, from feeling the full force of some of the most powerful motives to such conduct. It makes the succession to property depend, not on the good or bad conduct of those who succeed to it, but on the terms of deeds written a century, perhaps, before they were in existence. Hence, its immediate effect is, to substitute a species of fatalism for discrimination; to throw property indifferently into the hands of the unworthy and the worthy; and it is plain it cannot do this without, in so far, weakening the motives which stimulate men to act the part of good citizens. When, therefore, we refer to the criterion of utility, it is immediately seen that the extraordinary industry of one generation may be too dearly purchased, if it promote the idleness of those that are to come after it; and, though this effect of entails over the succeeding heirs be partially countervailed by various circumstances that will be subsequently noticed, it is never wholly defeated.

As to the second point, a system of perpetual entail

undoubtedly affords the best attainable security for the permanence of property in particular families, and we have seen that this is a circumstance on which much stress may be deservedly laid. Old territorial families enjoy a degree of consideration in their respective localities, that is rarely participated in, to any very considerable extent, by the families of *parvenus*, even though the latter should be the more opulent. The former have the *prestige* of antiquity on their side; they have lived for centuries, perhaps, in the same family mansion; they are known to every body in the vicinity, many of whom may have been indebted to them for kindnesses; and there is a disposition, not merely amongst those they have obliged, and their tenants and dependants, but generally among their neighbours, to extenuate their faults and exaggerate their merits. They have, for the most part, hereditary opinions and prejudices, as well as hereditary estates; and to these they are accustomed to adhere, with a tenacity to which the other classes are mostly strangers. Hence, they enjoy in a peculiar degree the confidence of those who may sympathise with them in opinion. They are a class, no doubt, though a very extensive one, and as such, have peculiar interests. These, however, coincide in all important respects with the real and lasting interests of the public. Whatever may be the case elsewhere, in England the nobility and gentry are not an isolated or excrescent, but an integral and essential portion of the community. They would lose, both in influence and consideration, by any undue increase of power on the part of the crown or of the people. They are, in consequence, opposed instinctively to all extremes, either on the one side or the other; the policy of the great majority, whether Whig or Tory, always having been, as it necessarily must continue to be, essentially conservative. This, however,

merely implies a wholesome scepticism with respect to innovations; and is not to be confounded with an unreasoning bigoted adherence to whatever is established. However excellent, all human institutions require, in order to their being perpetuated, occasional revision and amendment. And though in general averse from changes, the higher classes and landlords, are neither systematically nor obstinately opposed to those well-considered reforms which are rendered necessary by the alteration of circumstances, and by the varying wants and exigencies of society. But they are mainly advantageous, in a political point of view, from their forming a natural counterpoise to the strong and ever-flowing tide of democratical encroachment. For, though the public interests may sometimes be promoted by the latter breaking through the barriers which oppose its progress, the efforts of the aristocratical classes, to maintain their ground, make these inroads comparatively gradual, slow, and safe. In our view of the matter, it would be most unwise to weaken the security which is thus afforded, through the existing settlement of property, against rash or capricious resolutions. To be really beneficial, all important changes in national affairs should be well weighed, and adopted only after mature deliberation. Hence, though the practice of entail in Scotland be carried to a vicious extreme, we should not recommend its unconditional abolition; but, merely, that it should be assimilated to the English, or to some such system. And as opulent individuals, being less necessitous, are less apt to be influenced by selfish motives, and generally display more independence than those in more depressed circumstances, it would seem that the privilege of executing perpetual entails of a certain amount of property might be advantageously conferred upon noble families. The House of Lords is indebted for the principal portion of

the influence it enjoys to the ancient descent, hereditary fame or present renown, and ample fortunes of the greater number of its members. These recommendations dispose the public to regard them with respect and reverence. But none of them would singly suffice. Illustrious birth, and the memory of great services, should be associated with the riches indispensable, in the public estimation, to their due lustre. Individuals without fortunes fully adequate to support their dignity are singularly out of place in the peerage. Its members should be able to devote, when called upon, their energies to the public service, without having their attention distracted by the care of providing for themselves or their families. Poverty is inimical to independence in every station, and most of all in one that is so elevated. Peers cannot with propriety engage in the businesses that lead to fortune; and when, therefore, they are in straitened circumstances, and do not either possess extraordinary talents or extraordinary self-denial (which are at all times rare), they can hardly avoid becoming the dependants of a party or of the minister for the time being. Few things, however, are more to be deprecated than this dependence. The public liberties are never so well secured as when power and privilege, from their lowest to their highest degrees, are associated with and founded upon property. And with a view to the securing that independence of the peers which is so very desirable, it would be good policy to enact that no individual should be advanced to the peerage unless he were able to establish a *majorat*, or to entail such an extent of land or other fixed property on his successors in the title as might be deemed sufficient to secure them, supposing they acted with ordinary prudence, from getting into difficulties and becoming dependent on the Crown.

But, though the desirableness of perpetuating certain

amounts of property in noble families should be admitted, it may be, and occasionally, indeed, has been contended, that entails are not necessary to that end; and that their sense of what is due to themselves, to their successors, and to the public, would be enough to hinder members of the hereditary branch of the legislature from dissipating their estates, or bequeathing them to strangers. Such statements are, however, altogether inconsistent with what actually takes place. That very many heads of noble families are influenced by the considerations now referred to is most true, but their influence is far from being universal. And, were it not invidious to specify instances of what must be well known to everybody, it would be easy to refer to various noble houses that have been greatly reduced, and to others that have been brought to the very verge of all but irretrievable ruin, by the folly or misfortunes of one or other of their ancestors. Property, even the most stable, whether it belong to nobles or commoners, is always liable to innumerable contingencies.

> Estates have wings, and hang in Fortune's power,
> Loose on the point of ev'ry wav'ring hour.
>
> * * * * * *
>
> Shades that to Bacon could retreat afford,
> Become the portion of a booby lord;
> And Hemsley, once proud Buckingham's delight,
> Slides to a scriv'ner and a city knight.

And hence the expediency, where there is a hereditary branch of the legislature, of making some considerable portion of the property of its members inalienable from the lineal heirs.

In venturing to make this suggestion, we are not singular. In his "Essay on Popular Discontents," Sir William Temple has truly stated, that much of the consideration enjoyed by noble families depends on the greatness of their estates, which, at the same time that it places

them above the temptation to do anything mean or unworthy, gives them the power of conferring favours, and of distinguishing themselves by their liberality. And he proposes that, to preserve the influence and independence of the peers, no individual should be created a baron unless he is able to entail on his successors in the dignity an estate of at least 4,000*l.* a year; and that a viscount should entail 5,000*l.*; an earl 6,000*l.*; a marquis 7,000*l.*; and a duke 8,000*l.* a year. Dr. Johnson has referred with approbation to this proposal.* Had it been adopted, it would certainly have added largely to the influence and the independence of the lords; and even now its adoption would have most important and beneficial results.

"With us," says Mr. Burke, "the House of Peers is wholly composed of hereditary property, and hereditary distinction; and made, therefore, the head of the legislature, and in the last event, the sole judge of all property in all its subdivisions. The House of Commons, too, though not necessarily, yet, in fact, is always so composed, in the far greater part. Let those large proprietors be what they will, and they have their chance of being among the best, they are at the very worst the ballast in the vessel of the commonwealth. For though hereditary wealth, and the rank which goes with it, are too much idolised by creeping sycophants, and the blind abject admirers of power, they are too rashly slighted in shallow speculations of the petulant, assuming, short-sighted coxcombs of philosophy. Some decent regulated pre-eminence, some preference (not exclusive appropriation) given to birth, is neither unnatural, nor unjust, nor impolitic." (On the French Revolution.)

But, supposing the power of entailing estates in perpetuity were conceded to, or made imperative upon

* Boswell's Life of Johnson, ii. 369. Pickering's ed.

noble families, there seems to be no good reason for conceding such power to others. A system of perpetual entail, if it be extensively acted upon, is, in a general point of view, certainly injurious; and, though constitutional considerations may require the privilege to be granted, under proper limitations, to a particular class, they do not require that it should be granted to every one. It is not possible to interfere to protect the families of the commons from the casualties to which they are naturally subject, by sanctioning a universal system of perpetual entail, without producing noxious results. It is the duty of government to adopt such regulations as may most effectually call forth the popular energies, and give stability to our institutions; but it is no part of its duty to inquire whether the frugality of those on the box of a county member's carriage, and the extravagance of those inside, bid fair to make their descendants change places; and still less to attempt to prevent such result, by raising indestructible ramparts round the property of the latter.

By preventing the sale of land, or placing it, as the lawyers say, *extra commercium*, entails are in some degree adverse to the spread of agricultural improvement. If an individual who has no taste for a country life, or who is ignorant of the best mode of managing land, succeed to an entailed estate, he is prevented from disposing of it to another; so that property is thus, it is alleged, frequently hindered from coming into the hands of those who would turn it to the best account.

But, though true to a certain extent, more stress has been laid on this circumstance than it deserves. How little soever the holder of an estate may know of the mode in which it should be managed, he will have little difficulty in selecting a steward or factor fully competent to this

duty. It is, indeed, a common remark, that those estates are in the best order in which the parties referred to are least interfered with by the landlords.

Under the system of entail established in Scotland in 1685, and continued down to 1770, an entailer might insert clauses in the deed of entail, prohibiting the granting of leases for any term of years, however short, and the burdening of the estate with any debts, even such as might have been contracted to effect the most indispensable improvements. But conditions of this sort, while they were irrelative to the primary object in view in making an entail, were extremely hostile to improvements; and the wish to remedy the inconveniences, of which they were found to be productive, gave rise to the statute 10 Geo. III. cap. 51., entitled "An Act for the Improvement of Lands, &c. in Scotland held under Settlements of strict Entail." This act effected some very important alterations. It authorises the holders of entailed estates, notwithstanding any contrary stipulations in the deeds of entail, to grant leases for ninety-nine years of patches of ground not exceeding five acres to one person, for the purpose of building: it also authorises them to grant leases of farms for fourteen years and one existing life, and, under certain stipulations, for thirty-one years; and it gives the heir in possession power to burden the estate to the extent of four years' rent for agricultural improvements, and of two years' rent for the erection of a mansion-house, being in all six years' rent, provided he contribute toward these objects a fourth part of what is charged upon the estate.

In so far as respects the granting of leases, this act left little to be desired. And the decisions in the House of Lords, prohibiting the pernicious practices of taking fines (Scottice *grassums*) at the commencement of a lease, and of granting

very long leases, have since placed the letting of entailed estates on a nearly unexceptionable footing.* But with respect to improvements the case is different. It is easy to see, that, without the adoption of stringent regulations, entailed estates might be burdened, under the act of 1770, with collusive debts; that is, with debts not really contracted for their improvement. And to obviate an abuse of this sort, it is necessary, to constitute a debt against an estate on account of improvements, that various conditions should be complied with in regard to the public notification of the improvements, the registration of the accounts, &c.; the omission of any one of which vitiates the claim upon the estate. And in consequence of the risk incurred in complying with these conditions, this part of the statute has not been so extensively acted upon as might, perhaps, have been anticipated. Individuals are but little inclined to advance money upon a security that may at any time be cancelled, should it be discovered that the necessary formalities have not been literally complied with. Several cases of this sort, productive of great hardship to the parties, have occurred; and it would be highly desirable were some means devised for

* The courts of law in Scotland have seldom, even in modern times, been satisfied with endeavouring to administer the existing law fairly and impartially; but have usually endeavoured to make their decisions square with their own views of what is right and proper. And having been for a lengthened period hostile to entails, they held, that heirs in possession were entitled to do any thing with the estate that an absolute proprietor could have done, provided it were not expressly prohibited by the entail. Hence, they authorised the practices of letting by fine (taking *grassums*), and of granting very long leases, though these were obviously most injurious to the succeeding heirs, and not less so to the public. The House of Lords, however, pronounced such practices to be illegal; and conveyed to the Court of Session a very distinct intimation that it was their duty fairly to administer the law as it stood, and to leave its alteration and amendment to the legislature.

simplifying the forms required to constitute debts by the act of 1770, and consequently for facilitating improvements. It will, however, be no easy matter to reconcile an increased facility of contracting *bonâ fide* debts, with that security against fraud, or the contraction of fictitious debts, that is so very essential. And this difficulty forms, in truth, one of the most formidable objections to the present system of entail.* (See act 10 Geo. 3. c. 51. in APPENDIX.)

It is sometimes, no doubt, said, that whatever facilities for the execution of *bonâ fide* improvements may be given to the heirs in possession of entailed estates, it is not to be supposed that they will undertake such as do not promise an immediate return; or, that they will either build or plant with the same spirit they would do did they possess the estates in fee simple, and had power to dispose of them at pleasure. But though this statement be, in part, well founded, it will be seen, on examination, that entails are not in these respects so injurious as might at first be imagined. In very many cases, perhaps, we might say, in the majority, entailed proprietors would not choose, supposing they had the power, to alter the order of succession laid down in the entail; and in these its existence has but little influence over their conduct as landlords. And though, when they happen to be at variance with their successors, their zeal for improvement may be materially abated, they often find it for their interest, considered merely

* A recent act, the 9 & 10 Vict. c. 101., empowers the owners of estates in Scotland, in common with those in England and Ireland, to borrow money from government, despite any provisions in entails to the contrary, for the purpose of drainage. Loans when so made are to be repaid by a rent charge, payable to government for twenty-two years, of 6*l.* 10*s.* a year for every 100*l.* advanced. Perhaps it might be advisable to convert some portion of the debts contracted under the act of 1770, into similar terminable rent charges.

as life-renters, to lay out money on their estates. Supposing, however, that they did not, the injury is less than is commonly stated. With the exception of farm-buildings and roads, the greater number of improvements effected by landlords go rather to beautify and embellish, than to add to the real utility or productiveness of an estate. Most meliorations of the soil and management are effected by tenants. In his Rural Recollections, Mr. Robertson, speaking of the Lothians, says, "The great mass of improvement, arising from a better mode of tillage, and system of rotation in cropping, has been owing almost entirely to the farmers, with very little example set them by the proprietors." (p. 352.) This remark is of universal application. At this moment, instances may be met with, in all parts of Scotland, of tenants holding under leases of nineteen years, expending from 5*l.* to 10*l.* and upwards per acre, on drainage. And now that entailed estates are let on leases of a proper length, and that the capital of the tenants is not swallowed up by fines on their entry to farms, the influence of entails in retarding improvements, though still sensible, has been greatly diminished.

It is not uncommon, indeed, to hear it affirmed, that in travelling over Scotland a stranger is never at a loss to distinguish between lands that are, and lands that are not entailed, the condition of the latter being always very superior to that of the former. But there is really very little, if any, foundation for such statements. Every one who knows anything of Scotland, knows that some of the most intelligent and liberal landlords * are to be found among the entailed proprietors; and that a large

* We do not mean that mock liberality so much in fashion, which, confining itself to speeches and professions, costs nothing, and is worth as little; but that genuine liberality which facilitates the efforts of deserving tenants, and confers on them substantial benefits.

proportion of the estates belonging to the latter, are at present, and always have been, in a high state of improvement, and their occupiers comparatively well off. That this is not universally the case with entailed estates is true; but we are not aware that they are more frequently in an unimproved condition than unentailed estates belonging to embarrassed and needy proprietors. Entailed estates being for the most part extensive, a district in which they are frequent has comparatively few mansions and plantations; and, on this account, has, perhaps, a less rich appearance than one where they are more frequent. But it by no means follows that it is, therefore, less productive. The probability seems, indeed, to be rather the other way. The parks and pleasure-grounds round the houses of the resident gentry are rarely productive; and, provided a country be well furnished with substantial farm-houses and offices, be well drained, well fenced, and well cultivated, it can afford to dispense with grounds kept for show.

That agriculture has made an astonishing progress in Scotland since 1760, notwithstanding the extent of land under entail has all the while been rapidly increasing, is a fact in regard to which there can be no question. We should not, however, be warranted in concluding, because they have been simultaneous, that the increase of entails has been conducive to the progress of improvement. On the contrary, there can be little or no doubt that they have, on the whole, operated injuriously on agriculture. But the continued and extraordinary improvements which have been effected on the vast majority of entailed estates, as well as on the country generally, sufficiently demonstrate that the unfavourable influence of entails, has been very greatly exaggerated. Indeed, when one looks into the writings of Lord Kames and other opponents

of entails about the middle of last century, and contrasts the accounts which they give of their mischievous operation with the existing state of things, their extreme exaggeration is not obvious merely, but ludicrous.* In truth and reality, however, the greater number of the statements that are now put forward on the same subject have no better claims to our confidence. Had entails been half as injurious as they have been, and continue to be represented, they must have been abolished as an intolerable nuisance fifty years ago.

We have already noticed the influence of perpetual entails in weakening the parental authority, and rendering the immediate heirs less dutiful, enterprising, and industrious, than they would otherwise be. The heir to an entailed estate may be said, indeed, to be a sort of semi-proprietor; at all events he has a vested interest in its succession which cannot be defeated except by his predeceasing his father or other party in possession. If he outlive the latter his succession is secure; and as this chance may in all cases be valued, heirs may generally raise money in anticipation of their succession; and this resource, though almost invariably ruinous, is often resorted to. A large proportion of the embarrassments of entailed proprietors may be traced to the obligations contracted during

* In an Appendix to the Sketches of the History of Man, published in 1774, Lord Kames says, "The quantity of land that is locked up in Scotland by entails has damped the growing spirit of agriculture. There is not produced sufficiency of corn at home for our consumption, and our condition will become worse and worse by new entails, *till agriculture and industry be annihilated.*" Now, the extent of land under entail in Scotland has been certainly more than doubled, perhaps more than trebled, since this paragraph was written; and yet agriculture and manufactures have made a more rapid progress in Scotland in the interval, and especially during the last thirty years, when entails were most prevalent, than in England or in any other country whatever.

their expectancy; and from which it is difficult for them afterwards to disengage themselves. The mischievous tendency of their influence over expectant heirs forms, in fact, the principal objection to perpetual entails, and it is one which it is very difficult to get rid of. In English entails this tendency is, from their comparatively limited duration, but little felt; but where entails are perpetual, or where they extend over several generations, it is very powerful.

It has been suggested, by way of obviating or mitigating the evils now alluded to, that all immediate heirs of entail should, on their arriving at the age of eighteen or twenty-one, be allowed, unless they are otherwise provided for, annuities proportioned to the value of the estates to which they are heirs. And we incline to think that some such regulation would be for the advantage of all parties. No doubt, however, the preferable plan would be to modify the system.

But, apart from the consideration now brought under the reader's notice, we are not disposed to attach any weight to the complaints of the hardships entails are said to impose on the heirs in possession. No one is obliged to take up the succession to property under entail. If A dislike it he may decline in favour of B, and so on. But we never hear of any such renunciation; and at bottom, the hardships in question resolve themselves into this, that individuals who have merely a life-rent interest in estates are not quite so well off as they would be were they the absolute proprietors! They have, however, good reason to congratulate themselves on their being life-renters. In numerous cases, at least under the older entails, the heirs in possession would do well to remember that they owe their succession to those restraints on alienation, and the contraction of debt, to which they so unreasonably object.

Had their predecessors been entitled freely to dispose of them, the owners of some of the best estates in Scotland would have had no more to do with them at the present time than they have to do with estates in the moon; and might, for anything that appears to the contrary, have been hewers of wood, and drawers of water, on the properties of which they are now the masters. Their complaints of the grievances they suffer from entails are, therefore, not a little misplaced. The latter may be injurious to the public interests; but it is contradictory and absurd to suppose that they can be injurious to those who are indebted to them for every thing.

No doubt we hear on all sides that, but for the restraints under which entailed proprietors are placed, they would be better able to provide for their families. This, however, is a very doubtful proposition; but supposing it to be true in all or in most instances, it is not a circumstance, when considered with reference to the public interests, entitled to much attention. The holders of life-rent interests in land are not in a worse situation than public servants, and professional people, whose incomes terminate with their lives. These, however, contrive, by means of insurances and otherwise, to provide for their families in the event of their death; and why may not the holders of entailed estates do the same? It is alleged, indeed, that if the latter borrow money to effect an insurance, to provide a marriage portion for a daughter, or to accomplish any other object, they have to pay a higher rate of interest than if they were the absolute owners of the lands: and this allegation is perfectly true. But they do not pay a higher interest than other parties with life interests, who constitute the great bulk of society, and who neither make complaints, nor would be listened to if they made them. The occupier of an entailed estate

yielding a clear annual revenue of 1,000*l.* or 2,000*l.* a year is in a better situation than a lawyer, or physician, or commission-merchant, making the same sum; for the income of the former is assured to him during life, whereas the incomes of the others depend, not merely on their life, but also on their having health to pursue their different occupations, and on their popularity and credit continuing unimpaired. It is further, too, to be borne in mind, that professional people have to provide for all their children, whereas the holders of entailed estates have to provide for the younger only, the eldest son succeeding to the estate. Nothing, therefore, can be more unfounded than the complaints of the injuries done by entails to the families of the possessors of entailed estates. If they be inadequately provided for, the fault rests wholly with their fathers.

It should further be observed, that this want of power to burden an entailed estate with adequate provisions for widows and younger children can hardly fail to be a powerful incentive to heirs in possession to accumulate monied property. A gentleman possessed of an estate in fee simple has no particular inducement to save a portion of his revenue, inasmuch as, by burdening his estate, he may, without difficulty, provide for his children. But the possessor of an entailed estate may be deprived of this resource; he may not be able to throw the burden of providing for his widow and younger children on his eldest son, or on the land; and if such be the case, he will be laid under a very pressing obligation to endeavour, by saving a portion of his income or otherwise, to make provision for them. In this point of view, therefore, a system of entail appears to be anything but pernicious. It is difficult to discover any more powerful motive to industry and economy than the desire to provide for

children, who must otherwise be left comparatively destitute, or dependent on others.

The legislature has, however, concurred to a considerable extent with the popular prejudices in regard to this part of the subject; an act passed in 1824, the 5th Geo. IV. c. 87., having given the holders of entailed estates, notwithstanding any prohibition to the contrary in the deeds of entail, power to make provision for widows and younger children. The amount of such provision depends on the extent to which the rental of the estate may be affected by the charge for improvements, under the act of 1770; but an heir in possession may at present leave to his widow an annuity of a *third part* of the nett annual value of the estate, that is, of its value after deducting public burdens, the interest of debts secured upon the estate, and all previous provisions; and he may, also, provide certain portions for his younger children. The gross amount of the various burdens that may be imposed on the estate under these acts (those of 1824 and 1770), is limited to *two thirds* of its nett annual value; and it is sometimes no easy matter, when a fixed charge has been created for improvements, and provisions have been made for the widow and younger children of one heir, to know whether any, and, if any, what amount of provision may be made for the widow and family of the next heir. But, though this difficulty, and the litigation to which it leads, were got over, we are disposed to think it would be better for all parties, supposing the system of entails to be continued, that the 5th Geo. IV. c. 87. were either repealed or very much modified. Under its operation, and that of the act of 1770, the income of the heir in possession of an entailed estate may be reduced to a third part of its nett rental; and out of this portion he has to keep up the mansion-house, and to defray the whole expense of

managing the estate, including the losses incurred by the failure of tenants, and such like contingencies. Hence, it follows, that the free disposable income of an heir of entail in possession of an estate of 12,000*l.* a year, may not, and sometimes does not, exceed 1,500*l.* or 2,000*l.* a year!* But it is not for the advantage of the community, of their property, or of their families, that the holders of entailed estates should be in such a situation; and the repeal of the act of 1824 would be at once the easiest and the best mode of putting an end to the inconveniences it has occasioned. Were this done, entailed estates would be liable only to the interest of the debts (amounting, when at a *maximum*, to about a third part of their nett rental) expended on improvements; so that the holders would have the remainder (about two thirds) to support themselves, and to provide for their widows and younger children. And while, under such circumstances, the obligation to make this necessary provision would, as already seen, tend to make entailed proprietors provident and economical, they would (which in some instances is not the case at present) have the means of saving. The act of 1824 was framed with the best intentions†, and may, occasionally, have been productive of advantage. But it is bottomed on the unsound principle of making that a fixed charge on the land which should, in all cases, be met by a saving of income. In the majority of instances its influence has been prejudicial; and its repeal would be of material service, not to heirs of entail only, but also to the public.

* For some details on this subject, see evidence of Patrick Cockburn, Esq., in the Report of the Commons' Committee on Scotch Entails, in 1828.

† Being introduced by the Earl of Aberdeen, it is commonly termed "Lord Aberdeen's Act."

It is commonly said, that entails enable the heirs in possession to deceive and cheat their creditors. But though this was formerly, and is still in some degree true of entails in England, where they are not inserted in a public register, it is quite otherwise in Scotland. It is ordered by the act of 1685, that every entail shall be inserted, *with all its provisions and clauses,* in a public register; and it is ineffectual unless this enactment be literally complied with. This register is open, on paying a small fee, to public inspection; and as every one who may happen to have any dealings with the possessor of an estate, of the nature of which he has any doubt, may at once learn, by referring to this register, whether it be entailed, and also what are the conditions of the entail, it is plain he has himself to blame, and no one else, if he make any improper advances to the party in possession. And it is almost needless to add, that this is very rarely done. The embarrassments, as well as the limited means, of heirs of entail soon become known; and but little money is lost by those who deal with them.

It results, from these statements, that the system of perpetual entail established in Scotland is not half so prejudicial as is commonly represented. But we are, notwithstanding, ready to admit that, as respects the estates of the commons, its operation is, on the whole, injurious. It fosters the growth of dissolute habits in the heirs of entail; locks up landed property in the hands of those who would be glad to dispose of it; prevents its acquisition by others; and fetters the application of capital to the land. And though the sinister influence of these circumstances has been very much exaggerated, and is in part countervailed by others of an opposite description, it is still far from inconsiderable. It would, therefore, be good policy

to prohibit the system of perpetual entail, and to introduce, in its stead, the English system with such modifications as may be deemed necessary. The latter has most of the advantages belonging to the former, and is free from almost all its peculiar defects. It gives a powerful stimulus to the industry and ambition of those who make entails, and has but a slight contrary influence over their descendants. It contributes to perpetuate property in families, which, in a political point of view, is of paramount importance; and while it does this, it confines its destination within reasonable limits, and allows it, should the necessities or interest of its holders require, to be afterwards diverted into other hands.

But though it be easy to prohibit perpetual entails in future, it is not so easy to deal with the deeds of that description in existence. These have established a right of property not only in the actual possessors and their families, but, speaking generally, in a wide circle of collateral heirs; nor could the rights of the unborn heirs of entail be affected without annulling the clauses in a great number of settlements, and, also, in marriage contracts and other deeds *inter vivos*. It is, therefore, hardly possible materially to relax the fetters of entails with strict justice to all parties; though it might, perhaps, be slowly and gradually effected, without inflicting any very serious hardship on any individual. We incline to think that this might be most easily brought about by saving the rights of the living heirs of entail, and of such heirs as may be born under *existing* marriage contracts. The interests of the possible heirs that might be prejudiced by the adoption of some such rule as this are of so very unsubstantial a description, that they might safely be neglected.

Consistently, however, with what has been already stated, we should object to the estates of the nobility of Scotland

that are under entail being emancipated from the restraints it imposes on their alienation, and on the contraction of debt; and would, on the contrary, apply these restraints to the estates held by peers in fee simple. By preserving property in particular families, perpetual entails form the only solid bulwark of a hereditary aristocracy. They anchor it firmly. And so long as they are maintained, the peers can never be deprived of that wealth, which, even more perhaps than antiquity of origin and high rank, is the surest foundation of influence and consideration. The abolition of entails, by exposing families to the risk of irreparable ruin through the misconduct or misfortunes of individuals, would, in the long run, be very apt to bring about the ruin of the nobility; a consummation which could not be effected without still more serious consequences.*

* The efforts made in 1764 and 1765 to effect an alteration of the law of entail in Scotland, gave rise to various publications. Of these the best (at least that we have seen) are entitled "A Free Disquisition concerning the Law of Entail in Scotland," and "Considerations on the Polity of Entails in a Nation, by John Dalrymple, Esq." (afterwards Sir John Dalrymple). The former is in opposition to, and the latter in defence of entails. Of the more modern publications on the same subject, that of Mr. Irvine, entitled, "Considerations on the Inexpediency of the Law of Entail in Scotland," which issued from the press in 1826, is one of the ablest. Sir John Dalrymple's Tract, though but little applicable to the present times, is still, perhaps, the best that has appeared in support of entails.

CHAP. IV.

Compulsory Partition— Influence of in France, &c.

WHATEVER estimate may be formed of the principles and conclusions embodied in the previous parts of this treatise, it must be admitted that they are at variance with the present practice of France and of some other countries. Instead of relaxing the restraints imposed in early and less enlightened ages on the devisal of property by will, modern French legislators have adopted a different course, and have given them increased efficacy. They appear to have taken the Roman legislation on the subject of intestacy for a model. The custom of primogeniture, and the preference of one sex to another, have been abolished as obsolete and noxious prejudices; a man's children have been made his *necessary* heirs; his power to bequeath property to others to their exclusion is considerably less than in Rome; they cannot, under any circumstances, be deprived of their legitimate share of the succession; and the Roman plan of making indirect entails by means of trust settlements, has been wholly set aside.

According to the law of France, a person with one child may dispose, at pleasure, of a moiety of his property, the child inheriting the other moiety as *legitim* or matter of right; a person having two children can only dispose of a third part of his property; and those having more than two, must divide three-fourths of their property equally amongst them, one fourth part being all that is then left at their disposal. When a father dies intestate, his pro-

perty is equally divided amongst his children without respect to sex or seniority.

Nothing can be more distinctly opposed to the principles we have endeavoured to establish, and to the system followed in this country, than this law. It is, therefore, lucky that it is now no novelty. It has been established for more than half a century, so that we may trace and exhibit its practical influence over the condition of the extensive population subject to its operation. Such an experiment is of rare occurrence, but when made is invaluable. And if its results should confirm the conclusions already come to, it will go far to establish them on an unassailable basis.

The law of compulsory succession in France (originally enacted in 1791) was not dictated by any large or comprehensive views of public expediency, but by a spirit of hostility to the aristocracy: and it is not to be wondered at that such a spirit should have been manifested. Originally the constitution of France did not differ very materially from that of England; but while the nobles and the commons preserved or acquired in this country their proper share of constitutional influence, in France they were gradually divested of all authority, and the whole power of the state was monopolised by the crown. It also unfortunately happened that while the nobility were deprived of political power, and rendered incapable of opposing any effectual resistance to the arbitrary proceedings of the sovereign, they were left in full possession of their rights as feudal landlords. These comprised the power to dispense justice in manorial courts, and a host of vexatious privileges connected with public works, game, the grinding of corn, &c., with an exemption from service in the militia, from tithes, and from the various direct

taxes which fell with their full weight on every one else. The rental of many estates consisted, previously to the Revolution, of little else than services and feudal payments, by the baneful influence of which the industry of the occupiers was all but extinguished. The country population was every where virtually in a state of prædial slavery; and while the nobility and clergy threw the burden of the *taille, corvées,* and other oppressive imposts, wholly on the commonalty, or *tiers état,* they engrossed to themselves every situation of power and emolument; so that down to the Revolution no individual, how meritorious soever, unless he obtained a patent of nobility, could be an officer in the army, or be promoted to almost any public employment. Government deprived the nobility and landed gentry of all that could have rendered them useful, at the same time that it left them all that could render them petty tyrants, and a curse to the country. Hence the extreme unpopularity of the aristocracy, or privileged classes in France, at the Revolution; and hence, also, its sweeping, bloody, and destructive character.

But every body knows that the feudal rights, now alluded to, are not of the essence of an aristocracy. On the contrary, their parasitical influence chokes its growth; while, by exciting the well-founded disgust of the other classes, they expose it to perpetual attacks, and sap the foundations of its power. Some of the more intelligent and sober-minded leaders of the revolutionary party in France had sagacity to discriminate between the aristocracy, and the abuses connected with it; and were alive to the importance of preserving the institution, and of endeavouring to strengthen its basis, by procuring the abolition of the latter. But reform came too late. The aristocracy and the oppressive and worthless privileges that had roused the popular indignation, were identified in public opinion,

and believed to be inseparable. Both, therefore, were overthrown; and to prevent the possibility of the aristocracy recovering at any future period from the blow by which it had been levelled with the dust, the custom of primogeniture was suppressed, and a compulsory law of nearly equal succession established in its stead! And whatever opinion may be formed of its influence in other respects, this law has completely answered the objects its proposers had principally in view. It has formed an insuperable obstacle to the re-establishment of any thing like an aristocracy. The peers of France have no real power; and there are no means by which, under the existing system, their influence can be increased.

It is seldom, however, that a law adapted to a particular emergency, may be maintained with advantage as a general rule of national policy; and it would have been singular had a device, originally fallen upon for the express purpose of splitting estates, been found beneficial as a rule for permanently regulating the succession to property in a great kingdom. Considered in a general point of view, the French law of succession seems to have all the disadvantages of perpetual entails with none of their advantages. By interfering so much with the disposal of a man's property, it weakens the motives to accumulation; while, by rendering the children in great measure independent, it weakens the parental authority, and has, in this respect, the same influence over an entire family, that the law of entail has over the eldest son.

The children of those who have any property are aware, from their earliest years, that, whether they deserve it or not, it must be parcelled amongst them. And can any one doubt that this certainty contributes to paralyse their efforts, and renders them less enterprising and less dutiful than they would have been had their condition

depended principally on themselves? and they had known they had no claim, other than their own deserts, on their parents? These, however, are not its worst effects. This, and every similar system, is sure to occasion too great an increase of the agricultural population; at the same time that it makes the land be divided into portions so minute that they neither afford sufficient employment to those occupying them, nor can be effectively cultivated. The strong predilection entertained by those brought up in the country for the pursuits of their fathers, has been remarked by every one familiar with rural affairs; and it is obvious that the existence of a law which makes the division of estates compulsory, affords unusual facilities for gratifying this predilection. It gives to many who might otherwise have been obliged to emigrate, or to resort to some other employment, the power of continuing at home in the line of life to which they have been accustomed from infancy. Should a family be unusually large, or should the paternal property be insufficient, when divided, to maintain the children in nearly the same class as their father, some of the more adventurous may, perhaps, sell their portions and engage in other pursuits. But, in the majority of cases, they continue to reside on the little properties obtained from their ancestors: and the fair presumption is, that the process of division and subdivision will continue, until the land has been generally parcelled out into patches, and filled with a population, destitute of the means and perhaps, also, of the desire of rising in the world.

A sense of the inconveniences arising out of the compulsory division of the lesser properties among various heirs, and of the poverty to which the latter would, in consequence, be doomed, is said to have had a sensible influence in lessening the number of marriages among their owners, and in retarding the period at which they take place.

But the principle of moral restraint is too feeble and irregular in its operation, to be able to contend successfully against a systematically enforced law. Its influence, such as it is, affects principally the middling order of proprietors; those whose estates are more ample being above the necessity of sacrificing their affections and instincts to the sense of duty to their offspring; while those whose properties have been already much subdivided, are for the most part too poor to be influenced by the motives referred to. But supposing that such were not the case, and that the principle of moral restraint was, in most instances, sufficient to counteract the injurious operation of the law, is that any excuse or apology for the latter? Why enact a law which society endeavours to defeat by such means? Why render marriage and the proper distribution of a man's effects irreconcileable?

In countries where the custom of primogeniture exercises a powerful influence, families become identified with estates, the family representing the estate, and the estate the family. The wealth and consideration enjoyed by the latter, depend upon, and are intimately connected with, the possession of the lands which have descended to them from their ancestors. They estimate their value by another than a mere pecuniary standard. They are attached to them by the oldest and most endearing associations; and they are seldom parted with except under the most painful circumstances. Hence the perpetuity of property in England in the same families, notwithstanding the limited duration of entails; great numbers of estates being at this moment enjoyed by those whose ancestors acquired them at, or soon after, the Conquest. But in France such feelings are proscribed. Estates and families have there no abiding connection. At the demise of an indi-

vidual who has a number of children, his estate can hardly escape being subdivided. And this effect of the law tends to imbue the proprietors with corresponding sentiments and feelings. "*Non seulement,*" says M. de Tocqueville, "*la loi des successions rend difficile aux familles de conserver intacts les mêmes domaines, mais elle leur ôte le désir de le tenter, et elle les entraîne, en quelque sorte, à coopérer avec elle à leur propre ruine.** Occasionally, indeed, the few individuals who have not got wholly rid of aristocratical prejudices, endeavour, by accumulating monied property, to provide portions for their younger children, so that the land may descend entire to the eldest son. But, except in the case of a few of the greater proprietors, or of those who are manufacturers or traders as well as landholders, this is all but impossible; and the longer the law continues, the weaker will be the principle that prompts to such conduct. Indeed, though ardently sought for by the poorer classes, real is at present held in less estimation by the more opulent portion of the community, than personal property. A landholder, without something like an equivalent monied fortune, knows, if he have more than one child, that his estate will, most likely, be sold or subdivided at his death; and having this knowledge, he regards it merely as a transitory possession, and takes comparatively little interest in its condition. He neither builds a mansion, lays out a park, nor undertakes many of the numerous improvements he might have undertaken had he felt assured his estate would continue entire. His vanity is not flattered, nor his industry stimulated by the hope of founding or perpetuating a family; but he must anticipate, even though he have only one son, that his property and his descendants will be ultimately, and at no very remote

* De la Démocratie en Amérique, i. 80. 4me ed.

period, merged in the undistinguishable mass of petty patches and occupiers. Hence, while the law of succession weakens on the one hand the motives to industry, it tends, on the other, to level and obliterate all distinctions of family and wealth. But the evil is, that the equality it introduces is not brought about by the exaltation of the poor, but by the depression of the rich. It is hostile to both classes, and nearly in the same degree.

It is not of course meant to affirm, that good fortunes are not accumulated in France. But they are seldom realised in land: and while their number is comparatively small, their continuance in a mass is next to impossible. A fortune in France is like a castle built on a quicksand; it is not held together by any principle of cohesion, but will, in a few generations, be broken down into such minute atoms as to be inappreciable. People and poverty, small patches of land and beggarly cultivators, comprise most part of what can be reckoned permanent in the present situation of France.

It is, however, alleged, by those who argue in favour of the law of equal division, that it cannot be carried to an improper extent; that the loss arising from the subdivision of estates or farms into lots too small to admit of their being farmed in the best manner, would either make the coheirs sell the property *en masse* and divide the price, or farm it in partnership. This statement proceeds on the gratuitous and unfounded assumption, that the conduct of the coheirs of small landed properties is in all cases regulated exclusively with a view to their pecuniary interests, estimating these as they would be estimated by merchants on the exchange of London or Amsterdam! The absurdity of such a supposition is obvious. The considerations now referred to, have in the majority of

instances, little or no influence over the coheirs of the smaller proprietors. They are, in fact, rarely attended to, unless when some or all of the children have left the paternal home, during the lifetime of their father, to occupy other farms, or to establish themselves in other businesses, or when they have married into other families. These *forisfamiliated* children, as they are called by the lawyers, generally prefer getting their share of the paternal property in money; and where they exist, it is usually either sold, or is retained entire by one of the heirs, who burdens himself with the provisions payable to the others. But, except in cases of this sort, or when the paternal property is already so small as to be incapable of providing for more than one family, it is commonly divided. When either all, or some of the children, have continued to reside with their father, and the property he has left is at all considerable, they have not merely to inquire what sum of money they might each derive from their share of the estate, were it sold, but they have farther to consider whether they could employ this money so as to enable them to subsist; and whether, supposing an opening were found for them in some other business, they could really turn their hand to it, or would choose to leave the employment to which they had been accustomed. And, though their joint income might be greater in the event of the property being farmed in common, than the aggregate of their separate incomes, supposing it to be split into lots, they would not be so independent; and each would be prevented from entering into adventures on his own account, and of availing himself of, what he would doubtless consider, his superior sagacity. Such being the case, it is idle to suppose that the mere amount of money they might realise by its sale is the only, or even the principal,

circumstance to which such coheirs would attend, in deciding upon the disposal of the paternal inheritance: and though there may be a few exceptions, there is no reasonable doubt that in the majority of cases, the motives that would induce the heirs of a divisible property, who had lived with their father, to parcel it among themselves, would preponderate over those in favour of retaining it entire.

It should always be remembered, in speculating upon the effects of any measure or rule of law upon the occupancy of land, that the fancied security which the possession of a piece of ground, however small, gives to a poor man, makes it be every where coveted by him. Some, indeed, of the ablest apologists of the compulsory law of succession, contend that the security of a large proportion of the population, resulting from the division of property it occasions, is one of its principal advantages.* Peasant proprietors are, it is said, "exempted from those painful anxieties that embitter the existence of day labourers, and of occupiers liable to be turned out of their holdings. They are ennobled, by the consciousness of independence. They look to the future as well as to the present, and are zealous alike in the performance of the duties of their station, and in defence of their rights and liberties. The properties they cultivate are their own; and knowing they will reap all the reward of superior industry, they become diligent, laborious, and enterprising." But statements like these, though admissible in a "Deserted Village" or an idyl, are about as visionary as the dreams of the golden age. The security afforded by the possession of a patch of land, is worse than insecurity. The independence which it confers is uniformly

* This security is not really so great as is commonly supposed. (See *post.*)

associated with poverty, frequently degenerating into destitution; it gives rise to the most revolting of all combinations, that of penury, pride, and laziness; and instead of expanding, contracts and benumbs every faculty. Granting its owner is aware that, in ordinary seasons, its produce will suffice to support himself and his family, he cannot fail to be at the same time impressed with the conviction that his destiny is fixed and irrevocable; that he has no means of advancing himself; and that he and his successors must continue to pass their days in the same unnoticed obscurity and poverty. And it is not possible he should have this conviction without being listless, and the slave of routine practices. The happiness of peasant proprietors seems very much akin to that of the oyster — they are ignorant and satisfied. There can be no improvement, and there is none, in countries so occupied. But it is otherwise when a country is divided into considerable farms, occupied by tenants paying fixed and fair rents. The latter must, as Arthur Young has pithily stated, "be industrious or starve." The payment of their rents is not the only obligation under which they are laid; for, as they cannot reckon with certainty on getting renewals of their leases, or of their occupancy being continued, they are compelled to exert themselves to provide a reserve stock on which they may fall back; that being the only means by which they can obviate the risk of being thrown destitute upon society. But, though such persons cannot, small proprietors can afford to be indolent and inattentive. The latter rely for support on the land; and as it cannot be taken from them, and they may (and in France *must*) divide it amongst their children at their death, the motives which impel them to industry, enterprise, and economy, are obviously far less powerful than those by which tenants for terms or

at will are influenced.* The security of peasant proprietors is not, therefore, a source of activity and wealth, but of indolence and poverty; and goes far to extinguish that desire to excel and to rise to a higher station, which is the origin of all improvement, and of whatever is refined and exalted. The small proprietors and farmers of France, "having absolutely no means of improving their condition, submit to necessity, and pass their lives contentedly."† It is customary at this moment in several

* This statement may be further illustrated by what takes place in the letting of lands. The radical difference between landlords and tenants occupying farms, consists in the circumstance of the former not having to pay that rent which must be paid by the latter. In other respects they may be on the same, or nearly on the same, level; and hence it is plain that every reduction of the rents paid by tenants, brings them so much nearer to the condition of proprietors. It might, also, be supposed, that the circumstance of a farm being low rented would not occasion any decline of the tenant's industry, seeing that all that he could make it produce, over and above the rent, by diligence and economy, would belong to himself. But such is not found to be the case. The occupiers of low-rented farms, especially if they have long leases, or feel themselves assured, by the custom of the estate or otherwise, of their possession, acquire a considerable portion of that security and apathy so fatal to the exertions of yeomen and peasant proprietors. To make farmers leave the routine practices to which they are very strongly attached, and to become really industrious and enterprising, their leases must not be too long, and their rents must be such as to impress them with the conviction that, if they do not exert themselves, their ruin will speedily follow. "I have not," says Arthur Young, "seen an instance of rent being very low, and husbandry, at the same time, very good. Innumerable are the instances of farmers living miserably, and even breaking on farms at very low rents, being succeeded by others on the same land, at very high rents, who make fortunes. Throughout my journey, I have universally observed that such farms as were the most wretchedly managed were very much underlet." (Tour in the North of England, iv. 376; and for further proofs of the same principle, see Analysis of Statistical Account of Scotland, part i. 258; Davis's Survey of South Wales, i. 165, &c.)

† Birkbeck's Tour in France, p. 34.

of the southern departments of that kingdom, as it was 3,000 years ago, to thrash corn by treading it with horses and oxen! And in some parts, the ploughs now in use, are fac-similes of those described by Virgil! * The same is uniformly the case wherever the land, devoted to purely agricultural purposes, is split into minute portions. In England you may not have good farming on large, but you never have it on small farms. The occupiers of the latter work hard and fare ill; but they can neither employ their labour nor their land to advantage; while they want the energy, knowledge, and capital, indispensable to an improved system of husbandry. Every one knows that those parts of Scotland, Kinross-shire † for example, where property is a good deal subdivided, are invariably behind in their agriculture, and are farmed in a very inferior style compared with those where estates and farms are more extensive. And if such be the case where the custom of primogeniture is rarely departed from, what must it be where this custom is wholly set aside, and the compulsory partition of the smallest properties established in its stead?

Still it may be said, and no doubt truly, that the law of equal succession is popular in France; but popularity is a very bad test of the merit of any law, and especially of such

* Hugo, France Pittoresque, &c., art. Corrèze.

† The summit of Benarty Hill, on the south side of Loch-Leven, commands a fine view of Kinross-shire; and Sir Walter Scott, being upon that summit, and looking at the flat expanse of Kinross-shire, and contrasting it with the country on the other side of the hill, is reported to have said, "What an extraordinary thing it is, that here to the north so little appears to have been done, when there are so many proprietors to work upon it; and to the south, here is a district of country entirely made by the efforts of one family (the Adam's of Blairadam) in three generations." (Lockhart's Life of Scott, c. 50.)

a law as this. Suppose a man has 5,000, 500, or 50 acres of land, and five children; four out of the five will consider the plan of equal division as infinitely more conducive to their advantage, than if the estate had gone to the elder brother, and they had been left without any, or with but a comparatively slender provision. They look merely to their own immediate interest; and neither inquire nor care about the influence of such a plan of distributing inheritances upon their remote welfare, or upon the industry and wellbeing of the community. But this last is the precise object, the promotion of which should exclusively engage the attention of the legislator; and it is his bounden duty to reject or oppose every scheme that may appear to be inconsistent with it.

If the law of equal succession operated only on very large estates, it would be less mischievous. But it cannot, with any show of consistency, be so restricted. The same principle, the same regard for what are called equitable considerations, that make 5,000 acres of land be compulsorily divided among five children, make 50 or even 5 acres be subjected to the same rule. The system has, in fact, no natural or necessary limit, save the incapacity of farther division.*

We acknowledge, however, that these statements are presumptive rather than demonstrative; that they are not so much exhibitions of actual results as anticipations of what these may rationally be supposed to be. But in this case the results of practical experience coincide with the deductions of theory; the subdivision of property in

* In Austria it has been enacted, that all landed properties not above 140 metzen, equal to about 66 acres in extent, shall be indivisible. But no such limitation exists in France; and, however salutary, it is obviously subversive of every principle on which the law of compulsory distribution is founded.

France, the state of agriculture, and the condition of the people, agreeing in all respects with the preceding statements and inferences.

The official returns published by order of government, supply authentic information in regard to the subdivision of property in France, and its growing extent. In 1815, for example, the land tax, or *contribution foncière*, was assessed upon 10,083,751 distinct properties; whereas in 1835, it was assessed upon 10,893,528, and in 1842, upon 11,511,841 such properties; being an increase in the course of the twenty-seven years ending with 1842, of no fewer than 1,428,090 properties, great and small! that is, we believe, of more than double the number of all the separate properties now to be found in Great Britain!

But it is proper to observe that these returns comprise all house properties separately rated to the *contribution foncière*, as well as all landed properties, and the increase of the former accounts, no doubt, in some degree, for the total increase in the number of properties, which is also in part explained by the division of commons, and the extension of cultivation over heaths, wastes, &c. since 1815. But these circumstances, though their operation must not be overlooked, have had less influence in adding to the number of properties than might have been supposed. For a large proportion of the buildings erected since 1814, have either been constructed on properties that have been subdivided in the interval, or have replaced buildings that had become ruinous and unserviceable; while most part of those that have been constructed on divided properties, were rendered necessary by such division, so that comparatively few buildings have been created that have occasioned the subdivision of properties. It is difficult to estimate the number of new properties

created by the subdivision of commons, and the cultivation of wastes, but they are not very considerable; for commons being for the most part divided among the proprietors of the adjacent lands, their division has tended far more to increase the extent and value of the contiguous properties, than to add to the number of new ones; and such, too, has been the case with the extension of cultivation over waste lands. Considerable additions have been made, in consequence of this extension, to the properties of various individuals in various parts of France; but there have been very few cases, indeed, in which reclaimed lands have been at once formed into new properties.

On the whole it may, we believe, be concluded on unassailable grounds, that of the 1,428,000 new properties created in France since 1815, fully 1,200,000, and certainly more than 1,000,000 have been formed by the subdivision of lands occupied for agricultural purposes.

It is necessary farther to observe, that the number of properties in the returns now referred to, and the number of proprietors, are by no means identical; a good many of the latter possessing property in different *arrondissemens*, and being assessed to the land-tax in each. So much so is this the case, that the best authorities seem to concur in thinking that the total number of proprietors of all descriptions may be estimated at from 5,000,000 to 5,500,000; and that of these not fewer than from 4,000,000 to 4,500,000 are proprietors of land! Hence, taking the latter at 4,250,000, and their families at an average of five persons each, it will be found that of the entire population of France, amounting in 1846 to 35,400,486, 21,250,000, or nearly two-thirds of the whole, belonged to the class of proprietors! And if we add to these the numerous families of tenants occupying lands, and the labourers occasionally employed in the various departments

of husbandry, the preponderance of the agricultural class will be seen to be quite immense. In no other European country is there such a vast body of proprietors; and except in Ireland, or where agriculture is the only employment, there is none where so large a portion of the population is immediately dependent on the soil.

The extreme subdivision of the territory of France is, if possible, still more clearly evinced by the returns of the assessments on the different properties. The *contribution foncière*, though there are great inequalities in its pressure, amounts, at an average, to about a fifth or a sixth part of the rent of the land; and the official returns show that it was assessed in 1835 and 1842 as follows, viz.: —

	1835.	1842.
Properties assessed at less than 5 fr. a year -	5,205,411	5,440,580
— from 5 fr. to 10 fr. - -	1,751,994	1,818,474
— 10 — 20 - -	1,514,251	1,614,897
— 20 — 30 - -	739,206	791,711
— 30 — 50 - -	684,165	744,911
— 50 — 100 - -	553,230	607,956
— 100 — 500 - -	398,714	440,104
— 500 — 1000 - -	33,196	36,862
— 1000 and upwards - -	13,361	16,346
	10,893,528	11,511,841

It appears from this table, that of the whole number of properties in France, nearly a half are assessed at less than 5 fr. a year; so that, taking the assessment, not at $\frac{1}{5}$th or $\frac{1}{6}$th, but only at $\frac{1}{10}$th part of the rent, it follows that about half the properties in France are not worth more than 50 fr., or 40*s.* a year. And as such house properties as are separately assessed usually exceed this amount, the necessary inference is, that the greater portion of these small properties consist of parcels of land, with or without cottages. It farther appears, that of the whole properties

of France in 1842, amounting to 11,511,841, no fewer than 11,018,532 were assessed at less than 100 fr. a year; whence, taking as above the assessment at only a tenth part of the rent, it follows that 11 out of every $11\frac{1}{2}$ properties are worth less than 40*l.* a year! And it also appears that there are only 53,208 properties in France assessed at upwards of 500 fr., or which are worth more than 200*l.* a year!

These returns are decisive in regard to the extreme subdivision of property in France; and the statements of those who are most attached to the existing law of succession, and least disposed to exaggerate its influence in parcelling the soil into minute portions, conclusively show that such has been its effect. Of the parties now alluded to, MM. Sismondi and Rossi are among the ablest and best informed. "*Chaque jour*," says the former, "*le parcellement des grands héritages se continue.*"* And the latter, in the second edition of his *Cours d'E'conomie Politique*, published in 1843, gives the following details with respect to the extent to which subdivision has been carried:—

"We may, without the risk of falling into any considerable error, divide the proprietors of our soil into three classes, viz.:—

"1st. The small proprietors, of whom there are about 3,500,000, possess half the productive soil of the country, each proprietor having, at an average, about 6 hectares, or 14·827 (nearly 15) acres.

"2d. The middling class of proprietors, which may be estimated at about 350,000, possess about half as much land as the smaller proprietors, that is, about $\frac{1}{4}$th part of the kingdom; and have, at an average, 30 hectares or 74·134 acres each.

* E'conomie Politique, i. 174, ed. 1827.

" 3d. The great proprietors, who may be estimated at about 90,000, divide among themselves the remaining $\frac{1}{4}$th part of the land, and possess, at an average, 120 hectares, or 296$\frac{1}{2}$ acres each." *

Such, according to M. Rossi, is the distribution of property in France. He farther affirms (*ubi suprà*) that it has no longer either large or even medium estates, *ni grande ni moyenne propriété.* But this is overstating the case. Of the 16,346 properties, assessed at above 1,000 fr. a year, many are extensive and valuable; though, when compared with the vast numbers of small and middle-sized properties, and with the extent of ground which they occupy, the large estates are so few and limited in their range, that they may safely be left out of view in most speculations having reference to the country generally.

M. Lullin de Chateauvieux, a well-informed agricultural and statistical writer, has given the following estimate of the distribution of the landed property of France. †

Distribution of the Territorial Property belonging to Individuals.‡

Description of Properties.	Minimum of Land Tax.	Number of Proprietors.	Average extent of Properties.		Total extent of Properties.	Aggregate Total.
	Francs.		*Hect.*	*Acres.*	*Acres.*	*Acres.*
Large Properties	1,000	8,000	355	877·256	7,018,048	42,819,930
	500	15,000	180	444·806	6,672,090	
	300	67,000	84	207·576	13,907,552	
	200	110,000	56	138·384	15,222,240	
Middling Properties	125	220,000	35	86·490	19,027,800	35,633,880
	50	480,000	14	34·596	16,606,080	
Small Properties	25				11,105,767	35,173,200
	0·05	3,900,000	3·65	9·018	24,067,433	
		4,800,000				113,627,010

This estimate, which refers to a period somewhat ante-

* Vol. ii. p. 70. We have turned the hectares into acres.

† We have substituted acres for hectares in the last three columns of the table; but that is the only change made in it.

‡ This excludes the land occupied by forests, &c. belonging to the state, and that occupied by roads, rivers, commons, and so forth.

cedent to that of M. Rossi, differs but little from his. M. de Chateauvieux includes under the head of "large properties" 110,000, the average size of which is only 138⅓ acres! Nothing can evince more clearly than this classification the different sense attached to the epithet "large" as applied to properties in France and in England. Here no one would think of calling an estate of less than 2,500 or 3,000 acres a "large property;" whereas in France a moderate-sized farm of 138 acres goes by that name; and one of 34 or 35 acres is called a middle-sized property.*

We should mistake, however, if we supposed that the subdivision of the land is truly represented by the number of properties separately assessed to the land-tax; for it must be kept in mind that these properties are not always, nor perhaps most commonly, integral or united. Very many proprietors have parts of their lands in more

* It might be reasonably supposed, seeing how much property is subdivided in France, that it would be for the most part farmed by the proprietors, and that there would be comparatively few tenants. Such, however, is not really the case. The habit of subdividing land is so universal, and the demand for patches so great, that individuals who have properties of from 70 and 80 to 100 and 200 acres and upwards, most commonly distribute by far the largest portion of them into middle or petty sized farms, which are let to the highest bidder. "Un grand propriétaire," says Sismondi, "plutôt que de donner sa ferme à exploiter à un seul fermier, trouve aujourdhui infiniment mieux son compte à partager son domaine entre un grand nombre de paysans ses voisins." (*Economie Politique*, i. 237.) Hence there are great numbers of tenants in France; and the system under which they mostly hold their lands is an all but invincible obstacle to the progress of good husbandry. That this is the case is obvious from the statement of M. de Chateauvieux, who tells us that no fewer than 14,500,000 hectares (35,831,573 acres) are occupied by *metayers!* The metayer system is indeed the only one in use in the districts in which tenants are most numerous. (See Patria, ou France Ancienne et Moderne, &c., i. 669. For an account of the metayer system of letting land, see APPENDIX.)

than one *arrondissement;* and the divisions of properties situated in the same cantons and communes are often extremely numerous and perplexing. A property, for example, which has been divided between two or three heirs, may not, after its division, consist of only two or three distinct portions, but may, very probably, be distributed into six, eight, or a dozen such. This arises from the fact of the coheirs being all anxious, where the land is of various qualities, and devoted to different purposes, to have a share of each variety, that is, to have equal portions of rich land, meadow, woodland, vineyard, &c. The extent to which this sort of subdivision is sometimes carried would hardly be credited, except upon the highest authority. It appears, for example, from the returns under the *Cadastre* (official survey), that the commune of Argenteuil, in the department of Seine and Oise, comprising 1550 hectares (3,830¼ acres), is distributed into the extraordinary number of 36,883 separate parcels! This, we presume, may be taken as a specimen of what M. de Tocqueville calls "grinding the land into the impalpable powder of democracy."

It is, therefore, apparent, that the law of compulsory division has inflicted on France a system equivalent to the *run-dale* and *run-rig** systems of England and Scotland, and the joint tenancy system of Ireland. Under these systems the lands included in a farm are distributed as equally as possible, quantity and quality taken together, among a number of tenants, who sometimes cultivate their lots separately, and sometimes jointly, or partly in the one mode and partly in the other. But owing to the distribution of the land into so many detached parcels, each tenant having a portion of the diffe-

* For an account of this system, see article Argyle, in the Geographical Dictionary by the author of this work.

rent varieties of soil in the farm, and the number of divisions, there is a great waste both of land and labour, and an all but total impossibility of turning either to the best account, or of making any improvement. Hence, in this country, the abolition of the *run-dale* mode of occupancy has always been looked upon as indispensable as a preliminary step to the introduction of any thing like an efficient plan of husbandry, and, except in some districts of the Highlands, it is now all but extinct in Great Britain; and vigorous efforts are also being made to effect its suppression in Ireland. But France cannot escape from its pestilent influence. It is entailed upon her by a fundamental law; and though something may, perhaps, be done to mitigate its effect, by facilitating and encouraging the re-union of dispersed properties, there are no grounds for supposing that the nuisance will be materially abated till its source has been dried up.*

It is certainly not a little singular that a law productive of such results should be popular among so intelligent a people as the French. This, however, is the case. Its principle is in their hearts: and to such an extent is it carried out, that few people avail themselves of the limited license it permits them to exercise, but divide their properties equally among their descendants. "L'égalité," says M. Rossi, "est dans nos mœurs: autant par esprit démocratique que par sentiment de justice, il est peu de parents qui osent enricher un de leurs enfants aux dépens des autres. Qu'on pense qu'on voudra de cette disposition générale des esprits: le fait est irrécusable."†

We are, however, assured that this law is more indebted

* For some statements, strikingly illustrative of the disastrous influence of this subdivision of the same properties, the reader is referred to the treatise of Mounier, De l'Agriculture en France, i. pp. 173—183.

† Economie Politique, ii. 82.

for its popularity to its supposed influence in a political point of view, than to its apparent respect for the rights and interests of younger children. It has been, and continues to be looked upon as the grand security for the permanence of the revolutionary establishment. Every proposal for an increase of the portion of the eldest son, or even for an increase of the power of the testator over his fortune, is associated in the minds of the French people with ideas of feudal superiority; and seems to be only the first of a series of efforts by which the aristocracy hope gradually to recover their wealth and privileges. Time only can efface these prejudices; and the probability is, that long before they have been obliterated, and the pernicious consequences of the present law fully disclosed, so great a change will have been effected in the habits and opinions of the people, as well as in the mode of occupying land, as will render it very difficult indeed, if not impracticable, to revert to a better order of things.

Among other imaginary merits ascribed to this law, it is said to have introduced peace into families; and that the "insolent prerogative of primogeniture"* being abolished, the children look upon each other as brothers, and entertain the warmest affection for their parents. But we are well assured, and should, indeed, have anticipated, that in this respect it has quite an opposite effect. Suppose an individual has three, four, or five children, and that the two or three eldest, having left their father's house at an early period, have established themselves in business, and made considerable fortunes, or have married heiresses: Can any thing be more preposterous than to lay it down that the father shall have no power to take these circumstances into account?—that he shall not

* Gibbon, Decline and Fall, c. 44.

distribute his fortune according to the interests and necessities of his family?—but shall be obliged to leave as large a portion to those who are already rich, as to those who have nothing to depend upon but what they may get from him? Though, nominally an equal, this is really a most unequal distribution; and though enforced by the law, is sure, in the majority of cases, to be, if possible, defeated by underhand practices. The truth is, that the scheme of compulsory partition renders the children jealous of each other, and of their father. It gives them rights of which they cannot be otherwise than tenacious. It might be defeated were the father allowed to dispose of his estate during his lifetime; and, therefore, if he either establish any of his sons in business, or give him any property, the circumstances may be inquired into, and the courts have, in numerous cases, ordered the equivalent of the expense so laid out, or the property so bestowed, to be restored to the common fund, and divided according to the provisions of the law. It is easy to see what a wide door is thus opened to litigation, fraud, and perjury. Nor need we wonder, that innumerable actions, arising out of alleged preferences, have been brought into the courts of law; and that their decisions have often been very conflicting.

The apologists of the existing law contend that the subdivision which has taken place since 1815 has not justified the anticipations of its opponents. Assuredly, however, the anticipations of those who are not satisfied with the *morcellement* of the last thirty-two years must have been not a little unreasonable. It is difficult to see how it could have gone on faster. The people, though in general without intending it, are always struggling with more or less effect against the influence of the law.

Subdivision is checked by heirs portioners sometimes agreeing, as already seen, to sell the property that they may divide the price: and it is further, and more effectually, checked by the marriage of heirs and heiresses. When the properties of such parties are immediately contiguous, their union may render them of a size adapted to an improved system of farming. But when, as is often the case, the property of the husband is in one part of a canton or commune, and that of the wife in another, little advantage results to agriculture from the marriage. In such cases, indeed, one of the properties is not unfrequently sold, and from the extraordinary anxiety of the humbler classes to obtain patches of land, they always bring very high prices, and are said to be as often purchased by persons who have made a little money in some other trade, as by the owners of the adjoining properties.

The anxiety to get possession of parcels of land now alluded to, has been noticed by most of those who have turned their attention to this subject. "*L'amour,*" says M. de Tocqueville, "*de la proprieté immobilière ne se retrouve plus habituellement que chez le pauvre. Le petit propriétaire foncier, qui a moins de lumières, moins d'imagination, et moins de passions que le grand, n'est en général préoccupé que du désir d'augmenter son domaine.*" (i. 82.) Garnier, the well-informed translator of the Wealth of Nations, and an admirer of the law of compulsory succession, states that while there is a very keen demand in France for small plots of land, there is comparatively little demand for moderate-sized farms. He exemplifies this by stating that a farm which would bring 4,000 frs. or 5,000 frs. a year of rent (160*l.* or 200*l.*), will not sell as a whole for more than five-and-twenty years' purchase, whereas, if it be divided into a number of small lots, it will most probably sell for forty

years' purchase.* Hence, when estates of a good size are brought to market, they are usually subdivided; and hence, also, the unavoidable conclusion that small patches of land are sought for in France, as they are sought for in Ireland, as a means of subsistence, and not in the view of realising a profit by their cultivation.

M. Rossi admits this source of subdivision, but he appears to think that the number of those who are willing to pay exorbitant prices for petty plots of land will diminish with the increase of schools and the spread of information.† We regret we cannot participate in this expectation. In most parts of France land is indispensable to existence. Its cultivation is the only calling to which the bulk of the population can resort; and hence the extraordinary price which it brings when split into fractional parts. How is the diffusion of elementary instruction among the peasantry to change this state of things? Will it add to the soil of France?—will it give her greater manufactures to employ, or colonies to which she may send a portion of her people?—and unless it do this, how is it to lessen the demand for scraps of land? The people of Ireland are incomparably better educated now than they were a century, or half a century ago; but has that taught them to renounce their dependency on the land for other sources of support?

The eagerness to purchase plots of land, even when the parties purchasing may have to borrow part of the price, is undoubtedly a principal cause of the extremely embarrassed state of the greater number of proprietors; though it be in part also, if not mainly occasioned by the loans

* Richesse des Nations, vi. 179. ed. 1822., and see *post.*

† Cours d'E'conomie Politique, ii. 89.

borrowed by heirs portioners to pay off the shares of their coheirs. But, however brought about, landed property in France is literally overwhelmed with debt. This is so much the case that a large proportion of its owners are barely able, with all their proverbial parsimony, to discharge the interest of the sums secured upon the land; and are wholly without the means of attempting any improvement, or even of recovering from an accidental calamity, such as a hail-storm or an inundation. In 1832 the debts secured by mortgage in France amounted to the prodigious sum of 11,233,000,000 fr.; in 1840 they had increased to 12,544,000,000 fr.; and they may at present (1847) be moderately estimated at 14,000,000,000 fr. At 5 per cent. the interest on this principal would amount to 700,000,000 fr. or twenty-eight millions sterling; but it is affirmed that the rate of interest varies from six to eight and ten per cent; and supposing it to average seven per cent, its gross amount would exceed *thirty-nine* millions sterling! *

It is not possible to say how much of this vast sum may be secured upon land and how much upon houses, factories, &c. But we shall not, perhaps, be very wide of the mark if we estimate the share of the annual interest falling upon the former at from twenty-eight to thirty millions sterling; and if we add to this enormous charge for interest, the direct tax or *contribution foncière*, assessed upon the land, it will be seen that the burdens laid on the soil of France are really gigantic. In truth a large proportion of the so called proprietors are little better than the slaves of creditors, to whom and to government they have very generally to pay all that their plots of land yield

* Dupuynode, E'tudes sur la Propriété Territoriale, p. 194.; Mounier, de l'Agriculture, i. 162.

over their own scanty subsistence. And when the reader is further informed that great numbers of small properties are annually sold for behoof of the creditors, it will be apparent that the boasted security of the peasant proprietors is nearly as imaginary as their favourable position in other respects.

But despite these statements, it is contended that there has been a great increase of production in France since the Revolution, and that agriculture has made a very considerable progress. While, however, we willingly admit that this statement is in part well-founded, we deny that it is in any degree inconsistent with or subversive of what has been previously advanced. The improvement in French agriculture since 1789 has not been a consequence but has taken place in despite of the law of equal succession. In all respects, other than giving birth to this law, the Revolution was of infinite advantage to agriculture. It abolished the seignorial rights of the nobility and clergy; restored freedom to internal commerce and industry; and swept off the tithes, *corvées*, *gabelle*, and other partial and oppressive burdens which weighed down the energies of the husbandman. And in addition to these advantages a very large portion of the property of the Church and of the privileged classes came into the possession of the cultivators, at extremely low, or nearly nominal prices; farmers were converted into landlords; small properties were augmented; and fresh energy given to all sorts of agricultural pursuits. But the law of compulsory succession has gone far to countervail these extraordinary advantages; while it has introduced serious evils that were formerly unknown. The cultivator of the soil is now, it is true, in the enjoyment of the same rights and franchises as the other classes, and can no longer be

trampled on with impunity. But he is, at the same time, subjected to regulations that discourage his industry, and impoverish himself and the class to which he belongs. He is not permitted to consult his own feelings, or the interests of his family, in the disposal of his property; and the conviction that his lands will, at no distant period, be divided and ruined, (for the processes are in most cases identical,) is always present to paralyse his exertions and make him indifferent to the future.

But it is unnecessary to repeat what has been already stated on these points. It is sufficient to observe, that the abolition of feudal privileges and partial burdens at the Revolution; the equal rights which it gave to all classes; the improvements that have since been made in the construction of agricultural implements, and in the science and practice of agriculture itself; the increase of towns; and the opening of improved means of communication, should have occasioned, had not some powerful contrary principle been at work, an extraordinary improvement in all departments of husbandry. But such has not been the case. Cultivation has, no doubt, been greatly extended; but its extension may be accompanied by a deterioration as well as by an improvement of agriculture; and the former, we fear, rather than the latter has been generally the case in France. Most part of the parks, chases and other widely-extended demesnes of the old nobility and gentry have been parcelled out and subjected to tillage; and the extent of pasture and meadow land, and the supply of stock, have also been greatly diminished. These circumstances, combined with the extension of tillage over commons and wastes, sufficiently account for the increased production of corn and potatoes, without laying any stress on the improvement of agriculture. Except, indeed, in a few particulars, especially those relating to the culture of silk, vines, and

garden plants, in which a minute system of husbandry has some advantages over that which is conducted upon a larger scale, there has been little or no improvement in French husbandry. In some respects it has retrograded, especially in the quality and quantity of stock. The law of equal succession has been strong enough to nullify all or by far the greater portion of the advantages conferred on agriculture by the Revolution, and by the advances made in other departments of industry during the present century. It is difficult to say whether it be most efficient as an anti-aristocratical or an anti-agricultural engine.

We subjoin some statements, borrowed mostly from practical authorities, illustrative of the operation of this law over agriculture. Among the English farmers who have visited France since 1815, the late Mr. Birkbeck of Wanborough was one of the most intelligent; and he makes the following statements in regard to its influence. "The population of that country (France) seems," says he, "to be arranged thus: a town depends for subsistence on the lands immediately around it. The cultivators, individually, have not much to spare; because, as their husbandry is a sort of gardening, it requires a large country population, and has, in proportion, less superfluity of produce. Thus is formed a numerous but poor country population. * * * The cultivator receives payment for his surplus produce in sous, and he expends only sous. The tradesman is on a par with the farmer; as they receive so they expend; and thus 50,000 persons may inhabit a district, with a town of 10,000 inhabitants in the centre of it, bartering the superfluity of the country for the arts and manufactures of the town. Poor from generation to generation, and growing continually poorer as they increase in numbers; in the country by the division and subdivision of property, in the

town by the division and subdivision of trades and professions; such a people, instead of proceeding from the necessaries to the comforts of life, and then to the luxuries as is the order of things in England, are rather retrograde than progressive. There is no advancement in French society; no improvement nor hope of it."* And in another place, he says: "I am fully aware of the deplorable consequences of the division and subdivision of little properties in a country like France, already so fully appropriated. I shall not waste your time by my expedients for obviating the mischief. A law the reverse of the present abominable regulation of descents, would, perhaps, be the greatest blessing, which a wise legislature could confer on France."†

Mr. J. P. Cobbett, who visited France about ten years after Mr. Birkbeck, expresses himself in regard to the same law as follows: —

"I hear on all sides, here in Normandy, great lamentations on account of the effects of this revolutionary law. They tell me that it has dispersed thousands upon thousands of families, who had been on the same spots for centuries; that it is daily operating in the same way; that it has, in a great degree, changed the state of the farm buildings; that it has caused the land to be worse cultivated; that it has caused great havoc among timber trees; and, there are persons who do not scruple to assert, that society in France will become degraded in the extreme, unless the law be changed in this respect.

"It must be confessed, that this law of scattering naturally leads to dilapidation and waste. It is not natural to expect that an owner of a farm, for instance, will have the same regard for, or consider himself bound to take

* Tour in France, 4th ed. p. 35.

† Ubi supra, Appendix, p. 19.

the same care of, the farm which he has purchased of a stranger, as he would of the farm upon which he had himself been born and bred up, the farm which his father had tilled, and which he had inherited in his father's name. Nor can it be any more expected, that the father while he lives should pay the same attention to the farm which is to be sold away, or cut up into lots sorely against his will, as he would to that which must remain in the hands of his son after he is gone. If he have to build the farmhouse, it is not likely to be built with so much care, or to last so long; his farm is not likely to be so well enclosed or so much beautified; he will not take the same pains about making the neat and lasting quickset hedge round his field, or in planting trees to be the future ornament of his dwelling, when he reflects that all these sources of welfare, comfort and good appearance, may, in a short time, become the possessions of some one whom he does not even know, and, consequently, cannot care anything about. For these reasons, as they tell me, an astonishing alteration has taken place in the province of Normandy, since the beginning of the Revolution. The farms here are not, I am assured, in anything like the same condition that they used to be, although they are still the handsomest and best cultivated in France. The people do not now take the same pride in the cultivation and embellishment of their farms. In all matters appertaining to farms, farmhouses, or whatever belongs to the occupation of farmers and country people, there is less attention paid to character or appearance.

"I have been assured, that, in many families of owners of land, the several members have come to an agreement with each other to act according to the ancient custom, and thus prevent the parcelling out of their estates and the extinction of their families. This may now and then take place, but generally it cannot; and it is clear, that if the

present law remain, the land must all be cut up into little bits; that a farmhouse must become a rare sight; and that a tree worthy of the name of timber, will scarcely be seen in a whole day's ride." *

The statements of the most distinguished French agriculturists in regard to the influence of the law of equal succession are precisely similar. "J'ai vu," says M. Bosc, "dans la ci-devant Lorraine principalement, et en grand nombre, des champs qui n'avaient qu'un mètre de large sur deux de long, et ceux du double de cette superficie étaient extrêmement communs, parceque partout les cohéritiers veulent partager toutes les pièces, quelques petites qu'elles soient." †

M. Rainneville, one of the best practical agriculturists in the north of France, in a tract published in 1834, after describing the destitute condition of the occupiers of small patches of ground, and the waste of labour which its subdivision occasions, concludes as follows:—"Telle est (et ce ne sont pas les hommes qui ont acquis une véritable connoissance de l'état de nos campagnes qui nous démentiront), telle est la somme des inconvéniens attachés à cette division, dont l'action funeste dévore le sol de nos campagnes avec une affligeante rapidité."

The Duke of Rochefoucault-Liancourt, celebrated alike for his virtues and misfortunes, gave, in a memoir written in 1814, an account of the subdivision of the estate of Liancourt, which previously to the Revolution was one of the best cultivated in France. "Une grande partie du canton du Liancourt que j'habite, a un genre de culture plus petit encore que ce qu'on appelle la petite culture. Ce sont de petites propriétés tellement divisées que dans

* Ride of Eight Hundred Miles in France, p. 169.

† Dictionnaire d'Agriculture, art. Subdivision des terres, tome xiv.

ce qui est vallon et surtout coteau; on trouvera difficilement des propriétés d'un arpent, et que beaucoup n'ont que douze verges, et quelquefois deux. L'arbre d'une propriété couvre une partie de la propriété voisine, dont les arbres couvrent, à leur tour, celle d'un autre voisin. Le nombre des corps de ferme dans ce canton, composé de vingt-six communes, n'est peut-être pas aujourd'hui de douze, dont aucune n'est d'une considérable étendue.

"Les propriétés déjà bien petites, se sont plus divisées encore par l'héritage des enfans, à la mort des premiers partageans. Mes clôtures, mes fossés faits avec soin, diminuant la part de l'acquéreur de la partie qui les avoisinait, ont été détruits et comblés; et cette destruction, toute naturelle pour de petits propriétaires, atteste combien la petite culture est incompatible avec les clôtures. Elle s'est considérablement multipliée au détriment de la grande. Mais, encore une fois, elle a été presque partout mal entendue. C'est toujours des grains qu'on a demandé à des terres qui n'en ont pas produit."

The Duke then subjoins the following observations on the condition and character of the small proprietors: —

"Le petit propriétaire veut avoir son grain, et ne calcule pas qu'il en aurait sûrement deux sacs au marché pour le prix de semence, de travail et de soins que lui donne la récolte d'un seul sac sur sa propriété, et par le salaire des journées qu'il aurait employées chez un propriétaire plus aisé. L'amour de la propriété, si naturel, si avantageux pour le bien d'un état a tourné, exalté toutes les têtes. Dans les momens d'ivresse de la Revolution, chacun a voulu être propriétaire, et la plupart courant après l'indépéndance et le bonheur, abandonnant le gain sûr que leur procurait leur travail chez les fermiers, n'ont trouvé que de la misère. Trompés dans leurs calculs, ils sont devenus des voisins

incommodes et dangereux, et, pour me servir de l'expression énergique de l'un de mes correspondans, ne sont à l'égard du bonheur de leur canton, que de vrais deserteurs qui maraudent pour soutenir leur existence."

In a well written tract published at Montpellier in 1826, it is stated:—"La subdivision toujours graduelle et infinie des héritages menace l'ordre social; et porte déjà, notamment dans le pays de grande culture, une atteinte grave à la prospérité agricole. Nul doute que l'agriculture est blessée de l'infinie division des propriétés rurales; par elle disparaissent ces améliorations à opérer en grand, qui, exigeant de fortes dépenses, ne peuvent être entreprises que pour de grands intérêts: par elle se perd la possibilité d'élever des troupeaux, source de toute fecondité: par elle les forêts se depeuplent, parceque celui-là seul qui possède beaucoup pouvant attendre les revenus qu'elles donnent, lui seul les respecte; tandis qu'au contraire la médiocrité de fortune, pressée de jouir, les transforme, pour avoir des produits annuels, en champs, qu'une génération voit créer et s'aneantir; par elle deviennent enfin impossibles ces reserves des récoltes qui mettent en mesure de lutter contre les mauvaises années, et contre le bas prix des produits de la terre. Les funestes effets du morcellement continu des propriétés rurales ne saurait être méconnus, le mal est certain; la plaie de l'état est ouverte, il s'agit de trouver le baume et les moyens de la cicatriser."

The Department of the North (du Nord) is reckoned one of the best cultivated in France; and in regard to it the inspectors of agriculture state in a report made in 1843,—"Les partisans exclusifs du morcellement des propriétés prétendent que nulle part la position du cultivateur est aussi heureux que dans les pays où la division des terres est arrivé à son comble; l'état actuel du dep. du Nord refute completement cette Utopie. Partout où les terres sont

très-divisées, il y a penurie des capitaux, et la culture ne se soutient qu'à force de main d'œuvre."

" On sait à quel point," says M. Degerando, " ce morcellement de la propriété rurale a été poussé dans une grande portion de la France par l'effet des évènemens politiques, et par la conséquence des nouvelles lois civiles. . . . On y voit des lots reduits par les partages à la surface d'un are; un champ, un pré, un vigne, déjà trop restreints pour être exploités avec avantage, se sous-diviser cependant entre un certain nombre de cohéritiers, qui, chacun préfèrent avoir leur part dans chaque fonds.

" L'attrait attaché à la jouissance de posséder ajoute encore à ce morcellement, multiplie le nombre des acheteurs. L'Auvergnat qui revient de Paris place ses épargnes dans l'acquisition d'une parcelle de terre. Tout habitant des campagnes qui parvient à se créer un pétit pécule ne connâit pas d'autre emploi. En continuant de la sorte, on arriverait à un état de choses où les sentiers necessaires à l'exploitation occuperaient la moité du sol, en la derobant à la culture: on finirait par adjuger la propriété d'une motte de terre." *

We shall make but one more quotation from a French author. M. de Tocqueville says, " Ce n'est pas sans doute à nous Français du XIX siècle témoins journaliers des changemens politiques et sociaux, que la loi des successions fait naître, à mettre en doute son pouvoir. *Chaque jour nous la voyons passer et repasser sans cesse sur notre sol, renversant sur son chemin les murs de nos demeures et détruisant la clôture de nos champs.*" †

In Corsica the system would seem to be as bad, or, if possible, worse even than in France. Among the answers

* See the excellent work, " De la Bienfaissance Publique," i. 236. Paris, 1839.

† Democratie en Amerique, i. 82.

made by the British consul in that Island, to queries respecting the state of its agriculture, transmitted from the Foreign Office in 1833, we find the following: —

"An ordinary land-owner in Corsica, where the division of labour is in its infancy, and capital scarce, will at once possess lands producing corn, and other grains, wine, oil, chestnuts, vegetables, fruits, &c., and soils of such fitness cannot well be contiguous. This natural separation is still more, and to a highly detrimental degree, enhanced by the following causes: for centuries the laws have protected an equal succession among children. The Genoese, when rulers, abetted this system, and the French law on heirdom, which found Corsica in an extravagantly parcelled state, has confirmed and aggravated it. These ancient and modern agrarianisms, unaccompanied by the remedies of capital and of various roads to industry, have made a proprietor of almost every Corsican, and have, it is true, averted mendicity; but they have, also, generally created a narrow situation, without resources, pregnant of family intrigues, and not unbloody dissensions, litigious propensities, and various checks on population. And combining with these incidents they have fostered maxims which again serve to the same end of disconnecting all landed property. It is a distinctive trait that the Corsican rather starves than sells land; that inheritances, which lose in value by division, still must submit to it; that advantageous offers are the more readily refused, the more such land would aggrandise and connect the purchaser's estate. These causes serve to explain how it comes that almost every one is a land-owner; and that an ordinary proprietor of the second class, worth 20,000 fr. (800*l.*), will have his little estates at ten or more unconnected places in a circle of many miles."

After these statements, which might be multiplied to

any extent, the reader will be prepared to learn that, though some parts of France are very fertile, and her soil is believed to be in general about equal to that of England, there is the greatest diversity in the amount of the products common to the two countries obtained from the same extent of land. And this amount is after all the grand test by which the comparative merits of their systems of husbandry are to be tried. How superior soever the one system may appear to be, still, if it yield less produce per acre, it is really inferior, and conversely. It is, therefore, fortunate that we have sufficient data for instituting this comparison, or rather *experimentum crucis;* and its result is more in our favour than even the previous statements could have made us anticipate. The average produce per acre of the crops of wheat in England and Wales, in good years, has been carefully estimated at thirty-two bushels an acre, and it is certainly not under thirty bushels. But in France the produce of wheat, even in the richest and best cultivated departments, is little more, according to the official returns and the best private authorities, than twenty bushels an acre; and at an average of the entire kingdom, it hardly amounts in a good year to fourteen bushels! This result is completely decisive. It shows that *one* acre of land in England yields, from its being better farmed, considerably more wheat than *two* acres in France: and if we took barley, or oats, turnips, beef, or wool for a standard, the difference in our favour would be seen to be still greater. *

The state of the agricultural population is, according to

* If labour were taken for a standard, instead of land, the result would be still more in our favour. One man and one horse in England, produce more corn and other agricultural produce than three men and three horses in France. Labour in the latter is misapplied and wasted.

the best native authorities, but too much in harmony with the state of agriculture. "Si en effet," says M. Lafitte, "le manufacturier des nos grandes villes est aussi avisé, aussi adroit que l'homme doit être aujourd'hui, *notre agriculteur est aussi ignorant, aussi pauvre que dans les siècles de la féodalité ; et nous avons l'indigente France du quatorzième siècle, pour consommer les produits de l'ingénieuse et riche France de dix-neuvième siècle. Une partie considerable de la population ne mange ni pain ni viande, ne se nourrit que de quelques grossiers legumes, et se couvre à peine de quelques misérables haillons.**

It may seem needless, perhaps, to dwell at any greater length on the influence of the law of compulsory succession. But the importance of the subject may excuse our attempting briefly to illustrate its operation in one or two respects to which we have hitherto but slightly alluded.

We shall not waste the reader's time by endeavouring to show that lands can never be turned to the best account in an agricultural point of view unless they be divided into such portions as may admit of their being farmed in an improved manner. But with small patches of land such apportionment is for the most part impossible. The latter may indeed be advantageously employed to raise vines, with the various fruits and vegetables, usually denominated garden produce, which require a great deal of attention and are best cultivated by the hand; but corn, cattle, turnips, and all the staple products of the soil, can neither be cheaply nor profitably grown except upon a large scale. A small farm of five, ten, or fifteen acres, may, if it be cultivated with care, and the produce be parsimoniously expended, enable its owner to bring up a family; but it will not in one

* Reflections sur la Réduction de la Rente, pp. 161, 162.

case in fifty enable him to accumulate stock, or to attempt any novel project or considerable improvement. "Where," asks Arthur Young, "is the little farmer to be found who will cover his whole farm with marl at the rate of 100 or 150 tons an acre? who will drain all his land at an expense of 2*l.* or 3*l.* per acre? who will pay a heavy price for the manure of towns, and convey it thirty miles by land carriage? who will float his meadows at the expense of 5*l.* per acre? who, to improve the breed of his sheep, will give 1,000 guineas for the use of a single ram for a single season? who will send across the kingdom to distant provinces for new implements, and for men to use them? who will employ and pay men for residing in provinces, where practices are found which they want to introduce into their farms? At the very mention of such exertions common in England, what mind can be so perversely framed as to imagine for a single moment that such things are to be effected by little farmers? Deduct from agriculture all the practices that have made it flourishing in this island, and you have precisely the management of small farms. * * * The division of labour which, in every pursuit of industry gives skill and despatch, cannot take place on the greatest farms in the degree in which it is found in manufactures; but upon small farms it does not take place at all. The same man, by turns, applies to every work of the farm; upon the larger occupation there are ploughmen, thrashers, hedgers, shepherds, cowherds, oxherds, lime-burners, drainers, &c. This circumstance is of considerable importance, and decides that every work will be better performed on a large than on a small farm. One of the greatest engines of good farming, a sheepfold, is either to be found on a large farm only, or at an expense of labour which destroys the profit."*

* Travels in France, i. pp. 409, 410.

In countries like England, where farms are usually extensive, labour divided, and an efficient system of husbandry generally introduced, the agriculturists have large quantities of produce to dispose of; so that there is an ample fund for the subsistence of manufacturers, merchants, and other inhabitants of great towns. But it is otherwise wherever the land is split into small portions. Its capacities are not fully developed; at the same time that it has to feed and maintain three or four times the number of people required for its proper cultivation. The families of the occupiers are in consequence the great consumers of its produce; and having but little surplus to spare, their demands for the things furnished by the other classes are proportionally limited. This occasions the fewness of great towns, the slow growth of population, and the stunted condition of manufactures usual in such countries. The stationary state of agriculture, and the poverty of those engaged in it, react upon other businesses, and occasion the depression, languor, and apathy, of all ranks and orders of people.

The population of France amounts at present (1847) to above 35,400,000, of which the proportion belonging to the different departments of husbandry, has been variously estimated at from twenty-six to twenty-eight millions. And we shall certainly be far within the mark if we suppose the agricultural population to amount to two-thirds of the entire population of the kingdom. On this hypothesis it follows (laying foreign importations for the moment out of view), that every individual belonging to the agricultural class in France produces food for $1\frac{1}{2}$ individuals, or that two agriculturists supply food for three persons; that is, for themselves and for an individual belonging to one of the other classes. Such a state of things contrasts

strangely with that which obtains in this country. In Great Britain the agricultural class does not amount to a third part of the whole population. But taking it at that amount, it is plain that every member of the agricultural class of England must, at an average, supply food for three individuals, or for two besides himself. Hence, while two husbandmen in France furnish a surplus of food, above their own consumption, adequate for *one* individual, the same number of English husbandmen furnish a surplus for no fewer than *four* individuals; showing, that as measured by its capacity of providing for the other classes of the population, English is to French agriculture as *four* to *one!*

It may be said, perhaps, that this conclusion is not warranted, inasmuch as a considerable portion of our population is usually fed on imported corn. But the difference in this respect between this country and France, is not so great as is commonly supposed, the importations into the latter, especially into the Southern departments, being in ordinary years very large. Without, however, insisting on this point, if we reduce the superior efficacy of English over French agriculture, from four to one to three and a half or three to one, we shall have made a decidedly greater allowance than is required to balance the heavier importations into this country. And, despite this reduction, the advantage on our side is quite enormous, and constitutes, in fact, the grand source of our superior wealth. It enables us to employ three and a half or three individuals in manufacturing, commercial, or other pursuits, for every single individual so employed in France; and, consequently, supplies us with a vast amount of wealth, conveniences, and enjoyments, of which our neighbours are wholly destitute, and of which they must continue to be wholly destitute, so long as their agriculture continues in its present

backward state. But, as stated in a late valuable work, "*Si l'agriculteur Français ne produit que peu pour la consommation générale, il faut principalement en accuser le morcellement de la propriété territoriale, et le defaut de division qui en resulte dans le travail agricole.*"*

The occupiers of petty patches of ground, when they have no other means of support, are very frequently compelled to raise those crops that yield the greatest quantity of food, though they may not be so well suited as others to the soil, or to the proper supply of the population. And, hence, the extraordinary extension of the potatoe culture in Ireland; and the rapid progress it has latterly made in Rhenish Prussia, Switzerland, Sweden, and every other country in which land is much subdivided. It appears, for example, from the official returns, that the medium produce of the crops of potatoes in France during the seven years ending with 1824, amounted to about 40,517,000 hectolitres; whereas their average produce amounted, during the seven years ending with 1835, to 63,951,000 hectolitres; being an increase in the interval of no less than 57 per cent. But the same returns show that during the same interval the produce of wheat increased only 15 per cent.; being little more than a fourth part of the increase in the produce of potatoes; and we are informed that during the ten years ending with 1845, the increase in the produce of potatoes as compared with that of wheat was still greater.

The influence of the subdivision of the land over the production of the useful animals, presents some curious results. As respects horses, in some instances it increases, while, in others, it diminishes their number. The first

* Patria, ou, La France Ancienne et Moderne, &c., i. 668.; Paris, 1847.

effect is produced by the subdivision of farms of 100 or 150 acres and upwards into farms of fifteen, twenty, or thirty acres. The latter are at once too large for spade cultivation and too small for the effectual and profitable employment of horses; so that where large, or moderate sized farms, are subdivided into farms of about the above size, there is generally an increase in the number of horses employed, at the same time that they are usually of a very inferior quality. When, however, the subdivision is carried farther, and the land is divided into minute holdings, or into portions of less than six or eight acres, it is sometimes wholly cultivated by hand labour, or by the spade; and when it is cultivated partly only in that way and partly by the aid of horses, the latter are not unfrequently either the common property of a number of contiguous owners, or are hired for the job by those who want them. But in these cases the number of horses is universally reduced; while the few that are kept are of a truly wretched description, dwarfish in their growth, and not half-fed. In the one case there is a surplus, and in the other a deficiency of horse labour; but in neither is it efficient or advantageously applied.

These circumstances explain the fact that, while France has now, on the whole, about as many horses as at any former period, their quality has greatly degenerated. At present, notwithstanding the efforts of Government to improve the breed, France annually imports from 25,000 to 30,000 horses, principally for the supply of the cavalry regiments. * And it is impossible it should be otherwise. Were her lands properly distributed and farmed, instead of importing, she might annually export many thousand prime horses. But one might

* Mounier de l'Agriculture en France, ii. 87, 88.

as well expect to gather grapes from thorns as to find a plentiful supply of the better varieties of horses in a country in which the land is so much subdivided. Superior stock, whether horses, cattle, or sheep, is very rarely met with except on the extensive farms of opulent and enterprising agriculturists, and of these our neighbours have very few.

The raising and feeding of cattle and sheep may coexist with small farms, if it be carried on by means of stall-feeding. But except under very peculiar circumstances, such as are found in certain districts of Belgium, the breeding and fattening of stock is rarely attempted, or can be prosecuted with a profit, unless on considerable farms; and the business has progressively declined in France as these have diminished. In 1789 the consumption of butcher's meat is estimated, in the official returns, to have amounted to 13·13 kilog. per head of the population, whereas in 1840 it only amounted to 11 kilog. per ditto. But it is material to observe that while the diminution amounted to only 6 per cent. in the lengthened interval between 1789 and 1830, it amounted to no less than 8 per cent. additional during the ten years ending with 1840! In Paris the decrease of late years has been most remarkable; the consumption, which the *octrois* give the means of ascertaining with considerable exactness, having been in 1789 at the rate of 75 kilog. per head; in 1812 of 70 per ditto; and in 1840 of no more than 22 per ditto; showing, that in 1812 the inhabitants of the capital consumed at a medium more than *three* times the butcher's meat they consumed in 1840.

This unprecedented decrease in the consumption of that description of food, an adequate supply of which is the best proof of the well-being of the people, has attracted general attention. It is admitted and deplored by the

defenders of the law of which it is a legitimate consequence. "*Sans interruption,*" says M. Dûpûynode, "*en France, le prix augmente et la qualité diminue. C'est là un fait deplorable; car il est bien démontré que la viande constitue un des principaux éléments de force et de santé. Les chiffres que je viens de rappeler prouvent que la production du betail a suivi une progression decroïssante en raison du morcellement des terres. Le petit proprietaire, en effet, ne peut pas élever; il faut pour cela avoir de vastes prairies, et attendre long temps avant de rien recueiller.*" *

It should farther be observed that the supply of manure, without which it were vain to expect good crops of turnips or of corn, is always pretty nearly proportioned to the stock of cattle and sheep, especially the former. It may, therefore, be inferred that the extraordinary decrease in the number of cattle in France, by occasioning a corresponding decline in the supplies of manure, must have led to a deterioration of agriculture. This, at all events, would be the certain consequence in this country of any considerable diminution of the quantity of stock; and this is affirmed to be, and we have not the least doubt is, also, the case in France.

But even this demonstration of the influence of the law of equal succession, in compelling the bulk of the population to resort to inferior varieties of food, and in deteriorating agriculture, is insufficient to make M. Dûpûynode renounce its support. He imagines, with M. Rossi and others, that he has found in the principle of association a specific, by which its mischievous operation in this and other respects may be obviated! The small proprietors are to associate and carry on their undertakings in common; and this, we are told, will enable them to

* Etudes sur la Propriété Territoriale, p. 86.

realise, at the same time, all the advantages of large and of small farms. It is difficult to speak seriously of such a project; and we hardly think there are a dozen farmers in England, and, probably, not more in France, who would not treat it with contempt. Such businesses as may be managed on a large scale, on a pretty uniform system, by agents employed for the special purpose, may be profitably carried on by associations. Certainly, however, agriculture is not one of them. Suppose 10, 20, or 30 small proprietors were to propose conducting the culture of their holdings in common: the lands of no two of them can be identical; and it is all but certain they will exhibit infinite varieties in the natural qualities of the soil, in the degree in which it has been improved, in advantageousness of situation, exposure, command of water, and fifty other things. How, then, are they to apportion the expenses of cultivation in the first instance? and how, supposing this to be done, are they to divide the produce? The thing is plainly impossible; and if the pernicious influence of the law of compulsory succession be not counteracted except by such means, it will prevail for ever.

Small proprietors may, it is true, combine to erect thrashing mills, to provide ploughs, and perhaps horses, to be used for their common advantage. But there would be great difficulties even about this; and such accommodations will, in all cases, be more cheaply and better provided by private parties than by associations. The making of roads and of main drains may also be effected by associated parties; though it may be quite as well or better done by rates levied on the various properties to be benefited, and expended under authority. The fact is that no association which is practicable touches one of the vices inherent in and peculiar to small farming. It cannot enable a patch of 5 or 10 acres to be cultivated in the improved scientific

manner in which a farm of 100 or 500 acres may be cultivated. It cannot put capital into the hands of the occupiers; it cannot enable that which is all but indivisible to be divided into suitable enclosures; nor can it enable those who consume almost all the produce of their lands, and who endeavour directly to supply themselves with every thing, to contribute largely to the supply of others.

But it is needless to insist further on these considerations. The association panacea is so evidently worthless that nothing but our respect for those by whom it has been put forth could have tempted us to allude to it.

Another product, that of timber, essential not to the beauty merely, but, also, to the warmth and productiveness of the country, is rapidly disappearing from the estates of private parties in most parts of France. It would be idle, indeed, to expect that small proprietors, living, as the phrase is, from hand to mouth, overwhelmed with debts, and anxious alike to obtain supplies of fuel and of ready money, and to extend the means of raising additional supplies of corn, potatoes, or vines, should hesitate about cutting down the trees found on their little farms. Even in the mountainous districts, where the woods are indispensable both for the shelter they afford, and for preventing the soil from being washed down, their destruction has been carried on in the most reckless manner. We find in a report of M. Blanqui, published in 1844, on the state of the woods in the departments of Isère, Upper and Lower Alps, and Var, a detailed account of the mischiefs that have been occasioned by their destruction, which has, in fact, obliged certain districts to be wholly abandoned. But the evil, he says, instead of being checked is daily increasing, with the increasing necessities of the

peasantry; so that *la destruction du territoire Alpin s'opére avec une rapidité et une intensité incroyables.* In the departments along the northern slope of the Pyrenees, where the growth of woods is equally essential, similar effects have followed from similar causes.*

It must not, however, be inferred, from anything stated here or in other parts of this treatise, that we look upon small farms, as being necessarily, and in all cases, an evil. We disclaim any such opinion. Small farms are generally best suited to the vicinity of large towns, and to hilly or steep grounds; but wherever there is a considerable demand for garden stuffs, or for those products which require minute attention and a great deal of hand-labour in their culture, or where the lands do not admit of the easy employment of horses and improved implements, they are preferable to large ones; nor can the lands of any country be properly distributed, or its agricultural economy be of the most improved description, unless it contain a due admixture of small and of moderate sized, as well as of large farms. But though we do not object to the former, provided they be not multiplied factitiously, and be not in excess,

* In proof of this we subjoin some statements from the Report of the Inspectors of Agriculture, in 1843, in reference to the Upper Garonne and the Upper Pyrenees. "Le morcellement des propriétés commence avec l'arondissement de St. Gaudens; il devient plus sensible à mesure qu'on avance dans le canton d'Aspet; il s'accroît encore dans celui de St. Real, et parvient à son dernier terme dans le canton de Bagnères-de-Luchon. Les habitants de cette localité, non content d'avoir partagé en tous sens le fond étroit qui forme cette vallée, ont successivement défriché les coteaux, puis les montagnes inférieures: aujourd'hui ils en sont réduits à transporter leur funeste industrie à des hauteurs tellement escarpées, que la position de celui qui les cultive ou qui y moissonne n'est pas sans danger. * * * Tôt ou tard, la misère ne peut manquer de faire justice de ces envahissements insensés, si l'on n'y remedie par le réboisement ou par des pâturages permanents. De tels abus réclament une prompte répression."

we do strenuously object to a law which, by compelling, in as far as is possible, the subdivision of every description of farms, multiplies the number of small patches beyond all proper bounds; a law which discourages the enterprise and controls the inclinations of the occupiers; which hinders the construction of proper farm buildings, the division of labour, and the employment of improved machinery in farming; and which covers the land with a redundant, half-employed, and beggarly population.

Where the number of small farms does not exceed the proportion necessary to furnish the products for the growth of which they are especially suited, their occupiers find employment, whenever their services are not required at home, on the more extensive farms in their vicinity; and sometimes procure the assistance of the ploughs, carts, &c. of their neighbours. In these cases the small farmers, as is exemplified in some parts of England, are remarkable for their industry. But where, as in very many parts of France, there are no large or middle sized farms, the occupiers of small patches have no means of employing their spare time on other lands; and unless they combine, as they have done in some parts of the Continent, some sort of manufacturing industry with their agricultural labour, they necessarily become, from the want of opportunity and motives to be industrious, excessively indolent; strong, healthy men, wasting, as Arthur Young has stated, entire days in carrying a dozen eggs or a chicken to market! It, however, appears reasonable to conclude, from the greater facility with which all sorts of manufacturing industry may be carried on upon a large scale, that the kind of combination now alluded to will become less and less practicable; till the holder of one or two acres, or of some such patch, has nothing else to trust to. Even if they were fully alive to the evil effects of indolence, parties so situated can do nothing

but indulge in it. Idleness and the minute division of the land are inseparably connected. The apathy of the Highland and Irish cottiers, when at home, is so extreme, as to be almost incredible to those who have seen them employed under other circumstances. It is not overpowered even by their greediness of petty gains. An unexceptionable authority, Sir George Mackenzie, says of the former, "Their families are universally in rags, and their children uneducated; industry is unknown to them, and their habitations are filthy in the extreme. The labour which is required for small farms occupies but a small portion of the time of the tenants; but they are so perversely indolent and careless, that while the people from other districts are employed in fishing, making kelp, &c., and receiving high wages, none of them can be engaged for such labour." * And in Ireland, though the whole dependence of the cottier population has been on the potato crop, their indolence is such that they have frequently allowed the potatoes to remain in the ground, after they were fully ripe, till they have been seriously injured, and sometimes destroyed, by frost! †

Its tendency to increase the chances of scarcity and famine is not the least of the long list of evils that follow from the too great subdivision of the land. Even in the best years the occupiers of small patches have but little produce to part with; and in unfavourable years they are themselves, as well as those who depend on them for supplies, usually involved in the greatest difficulties. The circumstances under which Ireland was placed, in 1846–47, furnish abundant evidence of the truth of this statement. The small occupiers having universally placed their prin-

* Survey of Ross and Cromarty, pp. 84. 257.

† Wakefield's Account of Ireland, i. 517 and 583.

cipal, and in many instances their entire dependence on the potato, were reduced by its failure to a state of absolute want; and had it not been for the liberal assistance afforded by England they must have wholly perished. Happily, however, the undue subdivision of the land has hitherto made but little progress in Great Britain; and the crops of corn being little if at all deficient, the loss of the potatoe crop did not entail (with the exception of some portions of the Highlands) any very serious privations on the people of this island; and we were able, besides supporting our own poor and the shoals of Irish paupers that cast themselves on our shores, to expend vast sums on the purchase of food for Ireland. But one shudders at the contemplation of what the state of the population in 1846–47 would have been, had the land of England been as much subdivided as that of Ireland. Famine in its sternest reality must, under such circumstances, have been everywhere prevalent; and the difficulties through which we have passed would have been aggravated more than a thousand fold.

The distress of the present year (1846–7) has been wholly confined to the countries in which subdivision has been carried to an excess; that is, to Ireland, France, parts of Belgium and of Rhenish Prussia: and the circumstance of the potato culture having been more extended in Ireland than in the other countries now referred to, is the sole cause of the distress being more severe in it than in them.* But the potato has rapidly extended itself among the peasant proprietors of France and other countries; and inde-

* It was, however, extremely severe, especially among the small peasant proprietors in many parts of Belgium and France, great numbers of whom were reduced to a state of all but entire destitution; and it occasioned the importation of very large supplies of foreign corn into both countries, and the suspension in both of all duties and restrictions on its importation.

pendent, of this, the subdivision of the land, under the law of compulsory partition, tends to reduce it, whether the occupiers subsist principally on potatoes or corn, to patches fit only to maintain families in the meanest condition, in ordinary years. And as such pauperised families have no means of assisting either themselves or others in bad years, the state of a large country generally occupied by them, in such calamitous periods, may be more easily imagined than described.

The consequences that have followed from the parcelling of the lands of Ireland and of France should serve as a beacon to the legislature and people of England. They are as impressive as the letters of fire on the walls of Belshazzar's palace; and it requires no prophet to explain their import. It is level to the comprehension of every one; and should make all who are anxious to preserve and promote the well being of the public unite in firmly opposing every project, however concealed or varnished, which tends, either directly or indirectly, to stimulate the subdivision of the soil.

The influence of the law of compulsory succession over the stability of the public institutions, is perhaps hardly less powerful than its influence over agriculture. The democratic or levelling principle is stronger in France than in any other European country. With the exception of the hereditary right to the crown, every thing has been new moulded in the revolutionary matrix. Though held by the greatest philosophers and statesmen, from Aristotle and Polybius downwards, to be indispensable in a well-constructed government, the aristocratical element is no longer to be found in French society; and the compulsory division of the soil, while it prevents the growth of an aristocracy, impresses the same character of mobility upon

landed possessions that is impressed on the families of their occupiers. Hence the prevalent want of confidence in the continuance of the present order of things in France. What is there in that country to oppose an effectual resistance to a revolutionary movement? It were idle to suppose that the army should long assist in coercing the democracy of which it is a portion. With the exception of the holders of funded property, and of the individuals in the employment of the court, but few could apprehend any immediate injury from a revolution; and the property of the former would probably be protected. There is no longer a powerful body of great landholders, with hereditary estates and titles, attached to the crown as to their legitimate head and protector; and the form of government, and the persons by whom it is administered, are immaterial to the owner of a patch of land, provided no change be made in the burdens laid on him. Monarchy in France has been stripped of those old associations and powerful bulwarks, whence it derives almost all its lustre and support in this and other countries. The throne stands in solitary though not unenvied dignity, without the shelter of a single eminence, exposed to the full force of the furious blasts that sweep from every point of the surrounding level. There is nothing intermediate, nothing to hinder a hostile majority in the Chamber of Deputies, from at once subverting the regal branch of the constitution, or changing the reigning dynasty. The peers, created for life only, are the mere creatures of the court, without public respect, present power or traditional influence; and there is no great class with that deep and abiding interest in the support of the existing institutions, that seems indispensable to protect a government against impulses, originating in popular prejudices and passions, and to give it that sense of security that is necessary to enable

it to act consistently on sound principles. Napoleon will most probably, be found to have formed a correct opinion, when he declared, "That the destruction of the aristocracy had proved fatal to all subsequent efforts for establishing a constitutional monarchy in France. The Revolution had attempted the solution of a problem as impossible as the direction of balloons. An aristocracy is the true support of the throne; its moderator, its lever, its fulcrum. The state without it is a vessel without a rudder; a balloon in the air." (Las Cases, iii. 23.*) Great ability and caution on the part of those in power may, no doubt, enable a government like that of France to exist for an indefinite period; but it must, notwithstanding, from its being isolated, and having no support in congenial institutions or associations, always be of the most precarious character. At present the members of the electoral colleges constitute the only variety of privileged persons to be found in the country; and it is believed by some that there is little to fear from the encroachments of power on the one hand, or of licentiousness on the other, so long as the colleges continue

* In pursuance of measures adopted in 1806 and 1807, Napoleon issued in 1808 a decree, authorising the establishment of majorats and hereditary titles. It is there stated: "L'objet de cette institution a été non-seulement d'entourer notre trône de la splendeur qui convient à sa dignité, mais encore de nourrir au cœur de nos sujets une louable émulation, en perpetuant d'illustres souvenirs et en conservant aux âges futurs l'image toujours presente des recompenses qui, sous un gouvernement juste, suivent toujours les grands services rendus à l'état." But, despite this able statement, this attempt to reconstruct an aristocracy was one of the most unpopular acts of Napoleon's government. The Revolution of 1830, having given more strength to the democratic principle, the hereditary peerage was soon after abolished; and, in 1835, the farther creation of majorats was prohibited, the duration of the few that had been established being at the same time limited to two generations.

on their present footing. Those, however, who trust to their permanency will very likely find that they are not much more stable than the things by which they are surrounded. They may resist for a longer or a shorter period the efforts that are being made to lower the qualification of the electors; but the probability is, considering the vast preponderance of those excluded from the franchise, that in the end these efforts will be successful.* And with every widening of the electoral basis the government will be rendered less stable, till at length it becomes wholly dependent on popular impulse —

—— sumit aut ponit secures
Arbitrio popularis auræ.

But though monarchy should be subverted in France, it would be the merest delusion to imagine that its downfal should lead to anything like a repetition of the enormities that accompanied and disgraced the Revolution of 1789. Society is now arranged on an entirely different footing. With the exception of the law of which we have endeavoured to exhibit the influence, there are few constitutional abuses to rectify; justice is not as formerly venal, partial, and infamous; the people are no longer oppressed

* Lorsqu'un peuple commence à toucher au cens électoral, on peut prévoir qu'il arrivera dans un délai plus ou moins long, à le faire disparaître complétement. C'est là l'une des règles les plus invariables qui régissent les sociétés. A mesure qu'on recule la limite des droits électoraux, on sent le besoin de la reculer davantage; car, après chaque concession nouvelle, les forces de la démocratie augmentent et ses exigences croîssent avec son nouveau pouvoir. L'ambition de ceux qu'on laisse au-dessous du cens, s'irrite en proportion du grand nombre de ceux qui se trouvent au-dessus. L'exception devient aussi la règle; les concessions se succèdent sans relâche, et l'on ne ne s'arrête plus que quand on est arrivé au suffrage universel. (De Tocqueville, Amérique, i. 92, 5me. ed.)

and impoverished by the privileges and exactions of a host of spiritual and feudal tyrants; and, though that be more doubtful, it may be supposed that they have had sufficient experience of the folly of attempting to conquer the world. At the same time every dispassionate observer must admit that so huge a democracy, so easily inflamed by prejudices, and having so little to fear from changes, must necessarily be an object of constant suspicion and alarm to the adjacent countries. But if the French be left to arrange their internal affairs as they think fit, without any interference on the part of foreigners, other nations have less to fear from them than is generally imagined. In a new contest they will have none of that popular sympathy which was their most efficient ally at the commencement of the wars of the Revolution. At present France is a democracy with a hereditary head; the first change may probably be to a democracy with an elective head; and that may again lead, as it has often done before, to a military and despotical government. But supposing this undesirable consummation to be realised, the chances are a thousand to one against its energies being ever wielded by another Napoleon.

It would be worse than useless, seeing the extent of the previous details, to enter into any lengthened statements with respect to the influence of the system of partition in other countries. There may sometimes be, owing to local and other peculiarities, slight differences in the results; but, speaking generally, they agree in all essential particulars with those exhibited in the working of the system in France. Such, according to Mr. Banfield's account, is the rage of the German peasants (along the Rhine) for slips of land, that in some districts they do not scruple to buy them at the rate of from 120*l.* to 150*l.* an acre! They

never, he says, bestow a thought upon the interest or profit they may make by such investments. They look only to the circumstance of their acquiring a means of subsistence, though it be inseparable from poverty.*

In Prussia (exclusive of Neufchatel) the population has increased from 10,169,899 in 1816, to 16,112,948 in 1846 ; and, though this extraordinary increase has been in part occasioned by the increase of manufactures, by far the greater portion of it is a consequence of the subdivision of the land. To rouse the energies of the country against the French, by whom it had been overrun, the holders of farms, under the old feudal system, were converted into landlords; and the restraints on the sale of land being, at the same time, removed, every encouragement was given to the acquisition of patches by the peasantry. Some of the measures adopted in furtherance of these objects, were not a little despotical; but the abuses they were intended to obviate were so deeply seated, and the importance of their removal, to the regeneration of the country, and its emancipation from its foreign task-masters, was so obvious, that they were carried into effect with but little opposition, and their influence in forwarding the objects for which they were intended, has been generally admitted. The calamities by which the country was then oppressed were such, that the more remote effects of any measure that promised immediate assistance in their alleviation were but little attended to. And it has turned out, as might indeed have been foreseen at the outset, that it is easier, in a revolutionary period, to change farmers into landlords, than to maintain them in the possession of their properties. The establishment of the law of primogeniture would have been the best way to have done this, but the Prussians have, on the contrary, adopted the system of equal partition that

* Industry of the Rhine, p. 53, &c.

prevails in France; and the same process of subdivision takes place at the demise of the successive proprietors of the land. Hence, on the one hand, the size of properties in Prussia is progressively diminishing; while, on the other hand, the number of proprietors is progressively increasing. This process has been facilitated by the extension of the potato cultivation; and the combined influence of the two is strikingly manifested in the rapid increase of population. In various parts of the country, the subdivision of the land has already been carried to such an extent, as to force itself on the attention of every one; and, though nothing has hitherto been done to check its progress, the importance attached to it is manifest, from the fact that a proposal for introducing the law of primogeniture into the succession to certain classes of properties, formed one of the principal subjects of discussion before the late (*first*) meeting of the Prussian Diet.*

The law of primogeniture formerly prevailed throughout the United States, but it was, finally, abolished at, or soon after, the Revolution. It has been said, that the equal division of landed property that has since prevailed in America, has not been injurious; and we are not disposed to controvert the statement. The facility of settlement afforded by the vast extent of the fertile and unoccupied lands belonging to the Republic, sufficiently accounts for this apparent discrepancy. These have supplied a ready and convenient outlet for every individual. Instead of remaining at home to divide the paternal property at their father's death, the sons of American proprietors in the Eastern states, generally emigrate to the "West," so that the influence of the law is nullified, as Mr. Chan-

* For some useful information on this subject, see a valuable article on Prussian Agrarian Legislation, in the Edinburgh Review for July, 1847.

cellor Kent has remarked, by the circumstances peculiar to the country. The French and Prussians have no such resource. A man whose share of the paternal property would only be some 5 or 10 acres in Brittany or Silesia, cannot get hold of 50 or 100 acres for next to nothing, by merely transferring himself to Burgundy or Pomerania. He is bound, as it were, to the spot which gave him birth; and has little choice, save between parcelling the paternal inheritance, and crossing the Atlantic to establish himself among a people of whose language and habits he is totally ignorant. It is, therefore, to no purpose to contend that, because the compulsory system has hitherto been comparatively innocuous in America, it must also be innocuous in Europe. Great practical questions of state policy are not to be settled by this sort of logical pedantry. When America is as densely peopled as France, the practice of compulsory partition, should it exist so long, will be as ruinous in the former as in the latter.

CHAP. V.

Succession to Leases.— Different in different Countries. — Ireland. — Scotland.

In countries, where the laws as to wills, and the distribution of property, in cases of intestacy, are nearly the same, considerable practical differences sometimes arise from their adopting a different classification of movable and immovable property. In England, for example, the lease of a farm is reckoned a portion of the movable estate of the tenant; and, supposing there are no stipulations to the contrary in the lease itself, he may devise it by will, or it will descend, in the event of his dying intestate, like the other portions of his goods and chattels. But in Scotland, a different rule is followed: there a lease is regarded as a real, or heritable estate; and unless a provision to that effect be inserted in the lease (which is rarely done) the tenant has no power to devise his interest in it. Neither can he assign or sublet, or subdivide the farm, which, at his death, descends entire to be occupied by his heir at law.

It may be supposed, perhaps, that the difference between these systems is a good deal less than it would at first sight appear to be, seeing that the parties to a lease in either country, may insert in it such provisions as they suppose will conduce to their mutual interests. But there can be no doubt that the English system tends to facilitate, and the Scotch to oppose, the subdivision of the land; and, on that ground, as well as others, the latter is

entitled to the preference. The operation of the poor laws, having made it for the interest of the landowners to resist the subdivision of farms, and the building of cottages, the English system has not had, in England at least, what may be called its fair influence. It has however, been long introduced into Ireland; and, having till lately been permitted to operate without let or hindrance, its effect has there been alike powerful and mischievous. The practice of subdivision, which had descended to them from a remote period, was so strongly rooted in the minds of the Irish people, that it was to no purpose that the few landlords, who foresaw the misery of which it would eventually be productive, endeavoured to prevent it by expressly prohibiting the subdividing and subletting of farms. The courts of law, being actuated by the prevalent prejudices, were hostile to such limitations; and the juries, before whom a case of this sort was occasionally tried, if they returned a verdict in favour of the landlord, almost uniformly awarded only nominal damages. Hence, instead of increasing with the increase of capital, and the more generally diffused knowledge of the correct principles of agriculture, the farms in the possession of the Irish tenantry have been gradually reduced, in most instances to mere patches. The descendants of agriculturists usually evince no little reluctance to embrace any other business than that of their fathers; and it is one of the singularities of Ireland, that the families of its occupiers have been relieved from this inconvenience. The law of that country, and the little effect given to the restrictive clauses in leases, have enabled generation after generation to follow in the track of their ancestors, till the whole island has been overspread with cottages, potato-gardens, and beggars! If a farm were not split during a father's

life, it was sure to be split at his death. Even the daughters were most commonly portioned by the gift of a patch of land; so that a farm originally let to a single individual, was at farthest at his demise, but most commonly sooner, divided into as many shares as he had children. How favourable soever the condition of Ireland might have been in other respects, this system was sufficient to have filled it with poverty and wretchedness.

It has been said by those who have ventured to apologise even for this practice, that it was the want of capital and not the power given to tenants to subdivide and sublet their farms, that occasioned their being split. Although, however, the increase of capital in Ireland, since 1750, or during the last century, has been less than in England or Scotland, it has, nevertheless, been very considerable; and yet, despite its increase, the subdivision of farms went on with a constantly and rapidly increasing rapidity till within the last twenty years, when it was checked by the Subletting Act. The custom of subdividing farms has done for Ireland, what the law of compulsory partition has done, and is doing for France. It taught every individual to lean for support to the land; and by providing for them, so long at least as the potato continued to flourish, a wretched subsistence with but little labour, it gave a powerful stimulus to population; and fostered that laziness and improvidence for which the Irish have been long proverbial.

The different system of Scotland has been followed by equally different effects. There the succession to farms, as well as estates, has been long regulated by the custom of primogeniture. The younger children of Scotch farmers are not taught from infancy to look to the land for support. On the contrary, they are early made aware that farming is not a business on which they can enter,

and that it is indispensable they should apply themselves to something else. In consequence, they either establish themselves in towns, or emigrate to other countries; and, we doubt whether any single circumstance has contributed so much as this, to inspire Scotchmen with the adventurous, enterprising spirit for which they are celebrated; to keep the agricultural population down to its proper level; and to diffuse prudential habits. Instead of becoming less, farms in Scotland have increased with the increase of the stock of those engaged in husbandry; which is followed as a means of employing capital with advantage, and not as a means of acquiring a mere subsistence.

The landed gentlemen of Ireland have, also, we are glad to say, become generally alive to the ruinous nature of the system under which their estates have been parcelled out. An act, the 7 Geo. IV. c. 29. prohibiting subletting, except with the written consent of the landlord, was passed in 1826. Had it been passed fifty years sooner, and been properly enforced, it would have prevented much of the bad husbandry, poverty, and misery, which now prevail in Ireland. And, notwithstanding the extent to which the evil had previously extended, and the difficulty of preventing underhand subdivision, this statute has been eminently beneficial. The comparatively slow increase of population in Ireland, between 1830 and 1840, is principally ascribable to its influence.

These statements show the importance of all rules and regulations that affect, though indirectly, the division of the land. Had the same rules of succession in regard to leases, prevailed in Scotland that have prevailed in Ireland, the condition of the former would have approached more nearly to that of the latter. The influence of the poor laws has been less sensibly felt in Scotland

than in England; and it would, consequently, have been less able to countervail the tendency to the division of farms, had it been sanctioned by the law of succession.* Fortunately, however, this has not been the case. Consolidation is the rule of the Scottish law, and division a rare exception in practice; and to this system the superior condition of agriculture and of the agricultural population, is in great part owing. †

* Though of late years there are but few instances in which leases have been granted in the lowland districts of Scotland, empowering the tenants to assign, subdivide, and sublet their farms, they have not been altogether unknown. In a district in the south-west of Scotland, where the farms are almost all large, and the tenants respectable, the late proprietor of a considerable estate granted leases to some of his tenants for twenty-one years, with a power to subdivide and sublet. These leases expired some years since; and one of the farms, comprising about four hundred acres had, when it reverted to the present proprietor, upwards of *fifty* tenants settled upon it! As no other estate in the county had been let in the same way, the tenants were easily ejected; but it is evident that it would have been very difficult indeed to have got rid of them, had the system acquired any considerable footing. This shows pretty clearly, that little more than the power to assign and subdivide farms has been wanting, to approximate the tenants of Scotland very closely to those of Ireland.

† The advantages to farmers of the prevention of the subletting and subdivision of farms, of their descent to the heir at law, and of leases being limited to nineteen, or at most, twenty-one years, are set in a striking light in a paper by a very intelligent practical farmer, embodied in our edition of the Wealth of Nations (pp. 565—569). We have given it a place in the APPENDIX to this work.

CHAP. VI.

Foundations. — Restraints on their Establishment. — Deathbed Settlements.

In the previous parts of this treatise, we have regarded the property transmitted from the dead to the living, whether under wills of a free or a compulsory character, as coming into the hands of individuals either in absolute right, or under conditions intended to continue its possession in certain lines of heirs. But property does not, necessarily, descend to individuals; and, wherever considerable latitude is given to the power of bequeathing, it is not unfrequently left for the promotion of some purpose of real or supposed utility. This, in truth, is the most copious source of FOUNDATIONS, that is, of institutions established to advance some pious, charitable, or other useful or benevolent purpose. Most old settled and rich countries have foundations for a great variety of objects. During the middle ages, it was customary to bequeath property for the establishment of monasteries, the performance of masses, and other religious uses; and for the formation of scholastic institutions. The two great universities of Oxford and Cambridge are noble examples of the last species of foundations; and by far the greater number of the grammar and free schools in most parts of England, and, indeed, of Europe, derive their origin from the same source. A vast deal of property has also been bequeathed by benevolent individuals in this and other countries, for the erection and endowment of

hospitals, or foundations of various descriptions, for the relief and assistance of the destitute, maimed, and impotent poor; for the construction of public works; and sometimes, also, for providing amusement and recreation for the public.

Considering the large amount of property vested in foundations, and their importance in a public point of view, it may appear strange that the principles on which they should be established, are far from being well ascertained. This, however, is not really to be wondered at, the subject being one of no common difficulty. We have already seen that, on the whole, sound policy would appear to suggest that individuals should be permitted to bequeath their property to strangers, to the exclusion of their children or relations. But it does not, therefore, follow, that they should also be authorised to disinherit their children and relations, that they may expend their property upon some public object. The disinherison of children or near relations, to provide for strangers, is a most ungracious proceeding, and one which hardly any misconduct on the part of the former will justify in the opinion of the public; and, hence, the little fear of its ever becoming injuriously prevalent. But, while the bequeathing of property for public purposes, to the prejudice of one's natural heirs, is more likely to gratify the vanity of individuals, it is not so likely to be condemned by the public. On the contrary, it is sometimes regarded with a considerable degree of favour. In this case, one family has not been injured that one only may be benefited; but it seems as if the injury of one was to redound to the advantage of the community. The disinherison of children or legitimate heirs, in favour of some public purpose or institution, is therefore different from their disinherison in favour of other private heirs; and this difference is, perhaps, suffi-

cient to warrant the legislature interfering in behalf of the former. It is a contradiction for the same individual to endow an hospital, and to leave his family destitute. In such cases, something like the *legitim* of the Roman law might, apparently, be introduced with advantage. Before a man begins to indulge in the vanity, or to claim the credit, of being esteemed a public benefactor, it would seem only reasonable that he should make some provision for his children and poor relations. The luxury of doing good to strangers, may in most cases be conveniently deferred, till justice has been done to one's own house.

But, where no undue or improper influence has been used, a public purpose is but seldom promoted by the disinherison of a deserving family; and it may not be thought worth while to guard against such an evil, by trenching on the freedom of devising property by will. The great difficulty in dealing with foundations, consists, first, in determining the objects for which they should be permitted to be established; and, second, in determining the degree of power to be given to the founders, to lay down rules or regulations for their government in time to come. It is plain that the decision of these points involves questions of equal difficulty and importance. With regard to the *first*, it will be readily admitted that it would be highly inexpedient to permit a foundation to be established for the promotion of any object inconsistent with, or hostile to, the well-being of the public. But it is not so easy a matter as might be supposed, to hinder this from being done. There would of course be no difficulty in preventing the establishment of a foundation which had an obviously irreligious or immoral tendency; but a foundation established with the best intentions may have a pernicious influence. The establishment of public schools and other institutions for the promotion of education,

may be said, speaking generally, to be highly advantageous; but if they be constituted so as to furnish instruction for the children of those who can, as well as of those who cannot, afford to pay for it, their utility becomes not a little questionable. The establishment of alms-houses, or retreats for the reception of deserving persons, broken down by age and infirmities, and without any means of support, is, also, highly beneficial. But such institutions are very apt to be abused; and if, instead of being receptacles for the poor and friendless, they become retreats for the reduced relations of persons in affluent or prosperous circumstances, the chances are they will do more harm than good. It would be easy, though it might be invidious, to specify sundry striking instances, of the truth of what has now been stated. They may be found in most great towns; and in some, where, perhaps, it would have been least expected, they have of late years been multiplied to an extent that has made the more intelligent portion of the citizens entertain serious doubts whether they be not positively pernicious. It may be laid down as a general principle, from which there are but few, if any, exceptions, that whatever individuals may do for themselves had better be left to their own care and attention. The efforts of the state and of benevolent parties, should be restricted to the assistance of those who have none on whom to fall back; and who are unable to furnish themselves with necessary accommodations. And it would be good policy to prevent the establishment of any charitable foundation which it was clearly seen would contradict this principle.

But, *second*, the great practical difficulty in dealing with foundations, consists principally in determining the degree of power to be given to the founders to lay down rules and regulations for their future government. The

objects for which foundations are established are, in the immense majority of cases, approved by public opinion at the æra of their institution. But this opinion may subsequently change; and though it did not, the method of administering foundations appears to be as susceptible of improvement as most other things. Here, therefore, we are beset with difficulties: For, if, on the one hand, the power given to founders to frame rules for the government of foundations were too much restricted, the establishment of the most beneficial institutions might be discouraged; while, on the other hand, if the wills of founders were in all cases unconditionally carried out, the consequences might be, and most likely would be, extremely injurious; inasmuch as it would be permitting the folly, ignorance, presumption or dotage of individuals, to become a standard for all future ages! But it is needless to say, that no pretension of this sort can ever be safely tolerated; and that no man, or select number of men, should be allowed to legislate for succeeding generations. It is difficult, indeed, or rather perhaps, impracticable to define, *à priori*, how far interference should be carried in such cases; but it is abundantly obvious, that it is frequently indispensable, even to the proper carrying out of the plans of the founders. It is impossible to doubt the pious and benevolent views of many of those who left property to monastic institutions; but still less is it possible to hesitate applauding the conduct of the reformers, who diverted this property to other purposes; and who justly considered, that the terms of a will or other instrument, dictated in a comparatively unenlightened age, should not be permitted to consecrate and prolong a system which had been discovered to be hostile alike to the spiritual and temporal interests of society. The regulations of the great Alfred, and of the other founders of the Universities of Oxford and Cam-

bridge, may have been excellent at the times when they were framed; but had they been strictly adhered to, their chairs must now have been filled with Aristotelian doctors, and with lecturers on the Ptolemaic system of the world, and the infallibility of the Pope.

The establishment of foundling hospitals is another instance of the same kind. They were projected and have been kept up with the best intentions; but it admits of little question, and is now, indeed, generally acknowledged, that they have been productive of a greater amount of crime and of mortality, than they have obviated. And such being the case, it is most unjust to the memory of their founders to suppose, that they would have bequeathed property for their foundation had they been aware of their real character and influence.

Even as respects the educational foundations in many parts of England, and apart from the important considerations referred to above, no one can doubt that their utility is in very many instances greatly narrowed, and, in not a few, wholly nullified, by the injudicious rules laid down for their government, and by the jobbing and corruption by which their revenues are frequently wasted. Every unprejudiced person acquainted with the circumstances, will readily admit that there are no institutions that stand more in need of a careful revision and remodelling than the foundations in question. The sphere of their utility might be very greatly extended, at the same time that the education which the greater number of them afford, might be vastly improved. And no one, surely, will contend, that more regard is due to the whims, caprices, or mistaken, though benevolent, views of the founders, than to the interests and well-being of the successive generations, to whom they might be made to furnish an education suited to the varying exigencies and demands of

the periods in which they live.* "Whatever," says a very learned and able writer, "may be their genuine origin, it is always proper to consider foundations of this kind (for educational purposes) as having originated in the pure motives of benevolence and public spirit; and to promote their correspondence with the progressive nature of man must be deemed perfectly consistent with the general principles which their authors ostensibly entertain." †

In his famous article on Foundations, in the *Encyclopédie*, Turgot contends, that they are universally objectionable; and that, sooner or later, they are sure to degenerate, and to become productive only of abuse. But we cannot join in this sweeping condemnation. That many foundations are prejudicial rather than otherwise, is most true; but such is not the case with others: and before condemning them in the mass, it should be ascertained that there are no means of obviating the abuses with which they are so apt to be infected. It must be admitted that the efforts hitherto made in that view have not been very successful; but this would appear to be a consequence, rather of the cumbrous and costly nature of the machinery resorted to, than of any difficulties inherent in the subject. In this country, the Court of Chancery has been vested with a sort of general jurisdiction or supervision over charities or foundations. It usually proceeds,

* The act 3 & 4 Vict. c. 77. authorises the Court of Chancery to extend the system of education in grammar schools, to regulate the right of admission to the same, &c.; paying due regard to the will of the founders. Some changes and amendments have been introduced into a few schools under this statute; but the entire system requires to be carefully revised.

† Memoirs of the Life and Writings of Buchanan, by David Irving, LL.D. Second Ed. p. 182.

on the petition of the attorney-general on behalf of the crown, to inquire into and correct abuses in their management; to decide, when there is any ambiguity in the matter, in regard to the intentions of testators; to apply property left for a purpose contrary to law, or for a purpose which may have become void, to some other purpose, &c. But the expense and delays of proceedings in Chancery are proverbial; and the grossest abuses may, and very frequently do exist, without their ever being brought under the notice of the Court. It is not enough to make this be done, that the attorney-general should suspect or be aware of their existence. In the ordinary course of practice he can take no step till some private party, called the *relator*, be associated with him in filing the information, who is to be bound to answer for the conduct of the suit, and for its costs in the event of its failure. And it is evident that no common zeal, joined to an extremely strong case, will be required, to induce any responsible party to encounter, on public grounds, what is always a serious and indefinite risk. To lessen the difficulties in the way of investigation, it was enacted by the 52 Geo. III. c. 101., that any two or more persons may, on obtaining the previous sanction of the attorney or solicitor-general, petition a court of equity to correct abuses in charitable trusts. The petition is to be heard summarily, and the order, which the Court may make upon it, is to be final and conclusive, unless appealed against within two years. Other regulations were also enacted, authorising the commissioners appointed under the acts 58 Geo. III. c. 91. and 2 Will. IV. c. 57., to inquire into the condition of charities; to certify cases requiring the intervention of the attorney-general, &c.; but the functions of these commissioners finally ceased in 1837.

These contrivances seem, however, to be alike operose

and inefficient. Little we fear will be done for the correction of abuses by trusting to the public spirit of individuals, or to their sense of duty. The chances of succeeding would be incomparably greater if, instead of making their amendment or eradication a source of trouble and expense to the parties prosecuting, we endeavoured to make it for their advantage. And, after all, the leading defects in most foundations consist less, perhaps, in the embezzlement or perversion of their revenues, than in their being established on erroneous principles, and in the maintenance of practices and regulations which have become obsolete, and should be changed.

But, although the supervision of the Court of Chancery has failed to prevent in the first instance, and thereafter to effect any real reform of the abuses in foundations, it would be rather rash to conclude that this cannot be effected by other and simpler means. As a preliminary step to a farther reform, it might, probably, be enough to open *all* foundations to the visits of inspectors appointed by government; who should be authorised to inquire into, and report, on every thing connected with their establishment, their revenues, administration, present state, and practical influence. Such publicity would do a vast deal of good, and it is not easy to see how it could do any harm. When abuses were disclosed, if they were not rectified by the parties, as would generally be the case, there would be a reasonable ground for the interference of government; and benevolent individuals would cease to lay out property in founding or endowing institutions, that were seen to be of questionable utility, or peculiarly liable to abuse.

Perhaps, also, it might be expedient to order that all projects, whether for the establishment of new foundations, or for the extension of those already in existence, should

be submitted to the examination of the Home-office or of some other department, whose business it should be to inquire into the circumstances, and having done so, to report whether the objects of the founders were really laudable; and whether the rules and regulations by which the foundations were to be governed were suited to their end. Inquiry might also be made into the condition of the families and relations (if there were any) of the founders; so that, in the event of their being left destitute, some provision might be made for them.

The Court of Chancery appears, in the interpretation of testamentary bequests, to act under a very strong bias in favour of charities. If a man bequeath property for a charitable purpose, though it be impossible, or contrary to law or the public interests as interpreted by the Court, the latter does not adjudge the property to his heir at law, but directs it to be applied to some purpose of the same species, though perhaps of a very different variety. This principle has been broadly stated by Sir William Grant as follows: "Whenever a testator is disposed to be charitable in his own way, and upon his own principles, we are not content with disappointing his intention, if disapproved by us, but we make him charitable in our way and on our principles. If once we discover in him any charitable intention, that is supposed to be so liberal as to take in objects, not only within his intention, but wholly adverse to it." But, notwithstanding the deference due to so eminent a judge, this doctrine appears to be alike inequitable and inexpedient. If the object for which property has been left be illegal or improper, the will is in so far void; and, being so, the right of the heir at law to the lapsed legacy revives in its full force, and is in all respects the same as if the legacy had never been made. Under

such circumstances the interference of the Court to defeat his claim appears to be a most oppressive and unwarrantable proceeding; and it has been regarded as such by some great legal authorities. Lord Chief Justice Wilmot has observed, in remarking on a case involving this principle, "If it were *res integra* much might be said for the heir at law; because in every other case, if the testator's intention in specie cannot take place, the heir at law takes the estate. And as the motive inducing the disinherison in a charitable devise, is a passion for that particular charity which he has named, if that particular charity cannot take place, *cessante causâ, cessaret effectus.* The right of the heir at law seems to arise as naturally in this case as in any other: but, instead of favouring him, as in all other cases, the testator is made to disinherit him for a charity he never thought of; perhaps, for a charity repugnant to his intention, and which directly opposes and encounters the charity he meant to establish. But this doctrine is now so fully settled, that it cannot be dissented from." *

Some curious instances might be given of the way in which the Court of Chancery has exercised the power, so justly objected to by Chief Justice Wilmot. Among others may be mentioned the will of a Jewish gentleman who left 1,200*l.* for the establishment of a *Jesûba,* or society for reading and expounding the Mosaic law. The Court set this will aside; and appropriated the 1,200*l.* to the use of the Foundling Hospital! It is difficult to perceive so much as the shadow of a ground for making this transfer. The establishment of a *Jesûba* does not appear to be in any respect objectionable; but if it were, why should not the heir at law have had the money, which became, on the

* Wilmot's Judgments and Opinions, p. 32.

will being set aside, his property? Why should it have been taken from him to be given to a charity the utility of which is more than questionable; and which, for anything the Court knew to the contrary, might have been disapproved of by the testator? "One," to use the words of Mr. Miller, to whose valuable work we beg to refer for further illustrations of this subject, "One does not readily perceive why all these instances of kindness should be shown to charities, which are denied to other parties. Indeed, the whole subject of charities well deserves investigation, both as it concerns the public, the heir or next of kin, and the reasonableness and consistency of the rules according to which this branch of the jurisdiction of equity is administered." *

It is probable, that by the adoption of some such agency as has been alluded to above, means might be found for securing to the public the full advantage of charitable or other foundations, without deterring really benevolent persons from undertaking their establishment. At all events, interference to a very considerable extent is absolutely indispensable, to make them uniformly subservient to the public interests, and in accordance with what may be fairly supposed would have been the wish of the founders, had they been aware of the circumstances. The principle of *laissez faire* may be safely trusted to in some things, but in many more it is wholly inapplicable; and to appeal to it on all occasions, savours more of the policy of a parrot than of a statesman or a philosopher. Whenever individuals set about founding establishments for the promotion of some purpose of public utility, it is the duty of government to make sure, before authorising their foundation, that the purpose of the founders is really

* Miller on the State of the Civil Laws of England, p. 284.

what it professes to be: and it is its farther duty to take care that the institution be not eventually perverted or misapplied; that the bounty which was intended for the support of the poor and the unfortunate, be not monopolised by the rich; and that what was intended for the encouragement of industry and good conduct, do not become an incentive to idleness and vice. It may happen again, as it has happened already, that the object for which an institution has been founded, may, in the course of time, cease to exist, or be ascertained to be unworthy of patronage; and, in either case, it would be a profligate waste of the national resources to expend money upon it. And we should not wait for a Reformation or a Revolution to divert the wealth, that is thus thrown away, into some more beneficial channel.

Owing to the prostration of strength, the decay of intellect, and the apprehensions with which most men are apt to be affected in old age, especially when accompanied by severe sickness, wills, made under such circumstances, that convey property from the lineal heirs, have usually been regarded with much suspicion. In most countries, indeed, certain regulations have been enacted, with respect to wills made *in extremis*, which have usually gone by the name of the "law of deathbed." During the ascendency of the Romish church, these regulations could not be dispensed with. The doctrine, that acts of violence, rapine and incontinence, might be atoned for by a deathbed repentance, provided its sincerity were vouched by making a liberal bequest to the church, was then sedulously enforced by monks and confessors; and, in consequence, a vast deal of property was transferred from its legitimate heirs to the clergy. The inexpediency of such a practice speedily became obvious. Families were deprived, through

the weakness of their fathers, and the arts of the priests, of their estates; and these having devolved upon the church, or upon some monastery, the crown lost its claim to feudal services, with the revenues arising out of wardships, reliefs, escheats, &c., which it received when the lands were held by laymen, and not by the church, or other corporation. In consequence, provisions were made, in the Great Charter and in various remote acts of parliament, for restraining this abuse, by preventing the vesting of lands in *mortmain,* (*in mortuâ manu,*) without licence from the king. But the ingenuity of the clergy most commonly succeeded in devising means by which to defeat or elude these provisions; and at the æra of the Reformation, they had acquired a large share of the landed property of the kingdom. Since that epoch, their influence has been much diminished; but it is still far from being inconsiderable, and the abuses inseparable from allowing sick persons to bequeath property for behoof of the church, or for charitable purposes, should be provided against. Persons inclined to make such a disposal of the whole, or of any part of their fortune, should carry their intentions fully into effect when they are in good health, and when there can be no suspicion of their being subjected to improper influences. And as individuals rarely injure themselves by the magnitude of their gifts, when they are made at their own expense, and not at the expense of strangers or of those who are to come after them, their heirs would have but little to fear from such displays of generosity. This view of the matter has been in part taken by the legislature, and acted on in the statute 9 Geo. II. c. 36., commonly called the Mortmain Act. It recites, that "gifts or alienations of lands, tenements, or hereditaments, in mortmain, are prohibited or restrained by Magna Charta, and divers other wholesome laws, as prejudicial to and

against the common utility; and that, nevertheless, this public mischief has of late greatly increased by many large and improvident alienations or dispositions made by languishing or dying persons, or by other persons, to uses called charitable uses, to take place after their death, to the disinherison of their lawful heirs, for remedy whereof," &c. The act then goes on to declare, that no lands or tenements, or money to be laid out on the purchase thereof, shall be given or conveyed, or anyways charged, or encumbered, in trust for the benefit of any charitable uses whatever, unless by deed indented, sealed, and delivered, in the presence of two or more credible witnesses, twelve calendar months before the death of the donor, and enrolled in the Court of Chancery within six calendar months after its execution; and unless such gift be made to take effect immediately, and be without power of revocation, or other clause for the benefit of the donor, or those claiming under him.

According to Lord Hardwicke, the legislature had two objects in view in passing this act, viz. first, "to prevent locking up land and real property from being aliened, which is made the title of the act; and, second, to prevent persons, in their last moments, from being imposed on to give away their real estates from their families."

It must, however, be admitted that, though highly laudable, these objects have not been fully realised by this statute. The universities and colleges of Oxford and Cambridge, and the colleges of Eton, Winchester, and Westminster, were expressly excepted from the Act; and exceptions have since been made in favour of various institutions established in the interval. Neither is it easy to see why the restraints it imposes should not have been extended to movable as well as to fixed property, or why individuals should be permitted to leave money by testa-

ment to charitable corporations, and not land. The interests of their families may be as seriously compromised by the former species of posthumous liberality, as by the latter. But, notwithstanding its defects, the act has been vigorously carried out by the Courts, and has certainly prevented large amounts of property from being diverted from the heirs to charitable purposes: and though, in a few cases, this may have been a disadvantage, there can be no reasonable doubt that, on the whole, it has been highly beneficial. Before establishing new charities, we should endeavour to eradicate the abuses by which those in existence are infected, and to set them on a proper footing. And, apart from all considerations in regard to the objects of testamentary bequests, it appears to be extremely unadvisable to permit "languishing or dying persons" to injure their families by "improvident alienations."

The hope of atoning for past offences, or of acquiring the reputation of being liberal, by making posthumous gifts for religious or charitable purposes, is not the only weakness that has to be guarded against. Flatterers, parasites, and the whole tribe of legacy hunters, are always most active and mischievous when their victims are in low spirits, or are depressed by sickness; and in modern times more injury is done to families by deathbed wills, dictated or inspired by stepmothers and mistresses, than by any thing else. But, surely, if a man be allowed freely to dispose of his property, it is not too much to require that he should do so when he is his own master (*sui juris*); that is, when he is in health and in the full enjoyment of his mental faculties. The power to disinherit children is too important, and involves too serious consequences, to be exercised by dotards, or by those whose minds and bodies are enfeebled by sickness. In

Athens, a will made under the influence of disease, or in the dotage of old age, or through the solicitations of women, was void. "The Athenians made no difference between deceit and necessity, flattery and compulsion, since both were equally powerful to persuade a man from reason."* And in Rome the arts and blandishments of stepmothers might be founded upon in an action (*querela inofficiosi testamenti*) to have a will set aside. *Non est consentiendum parentibus, qui injuriam adversus liberos suos testamento inducunt; quod plerumque faciunt, malignè circa sanguinem suum inferentes judicium, novercalibus delinimentis, instigationibusve corrupti.*†

The law of Scotland has also manifested a strong repugnance to deathbed settlements; and has given to the heirs at law power to cancel all deeds made to their prejudice by their predecessors within sixty days preceding their demise, provided they were then labouring under the disease of which they died, and were not subsequently seen, without support, at church or market. And without pretending to specify the conditions under which a similar principle might be introduced into the law of this part of the empire, it is enough to lay it down generally, that all devises of property from the lineal heirs, made on deathbed, should be held to be invalid.‡

* Potter's Grecian Antiquities, lib. iv. c. 15.

† Digest, lib. v. tit. 2. § 4.

‡ This principle is said to have been originally embodied in the law of England; and that, after the power to alienate certain descriptions of land by will, had been introduced, the consent of the heirs at law was necessary to the validity of wills for such an object made on deathbed, or in *articulo mortis*. (Dalrymple on Feudal Property, 3d ed. p. 110.). But, in the course of time, such consent, if it ever were required, was dispensed with. And in the reign of Henry VIII., the legislature, notwithstanding it was fully aware of the abuses

of which they had been productive, sanctioned the validity of death-bed wills disposing of immovable property.

In the preamble of the act, 27 Henry VIII. c. 10., we find the following statement, "And also (referring to property disposed of) by wills and testaments, sometime made by *nude-parolx* and words, sometime by signs and tokens, and sometime by writing, and for the most part made by such persons as be visited with sickness in their extreme agonies and pains, or at such time as they have scarcely had any good memory or remembrance; at which times they, being *provoked by greedy and covetous persons lying in wait about them, do many times dispose indiscreetely and inadvisedly their lands and inheritances, by reason whereof*," *&c.*

The statute then proceeds, with singular inconsistency, to give effect to all wills made before the 1st May, 1536, when it was passed. A subsequent act of 1540, 32 Henry VIII. c. 1., permitted all persons to devise lands, held in soccage, by will or by testament; and the act, 12 Charles II. c. 24., having converted all tenures into free and common soccage, it became law that all estates might be disposed of by will, whether made in *articulo mortis* or otherwise. (See *antè*, p. 9.)

CHAP. VII.

Community of Goods. — Agrarian Laws.

SOME speculative philosophers and politicians of antiquity and of modern times, have been so much struck with the evils arising from the violations of private property, to which the ill-regulated cupidity of some, and the destitution of others, are always giving birth, that they have proposed to obviate them by abolishing the right of private property. Under a system of this sort, testaments would be unknown, the state or public, which never dies, being alone possessed of wealth. Men were to labour in common, and individuals were to share equally in what had been produced by their joint industry. Those who recommended the establishment of a commonwealth of this sort, believed that it would eradicate that selfishness which is so fruitful a source of mischief; that as no one would be either richer or poorer than his neighbour, no one would be an object of envy or attack; and, that the principal sources of discord and crime being dried up, men would live amicably together and be anxious only to promote each other's welfare. But these expectations are wholly inconsistent with the nature of man, and cannot therefore be realised. We might as well attempt to suppress the sensation of hunger, or of thirst, as the principle of self-interest; and if we could suppress it, we should, at the same time, suppress the principle which impels man to labour, to contrive, and amass. "The active, insatiate principle of self-love, can

alone supply the arts of life and the wages of industry; and, as soon as civil government and exclusive property have been introduced, they become necessary to the existence of the human race." * It is to be born in mind that there is nothing in any degree blameable in our preference of ourselves to others. The desire of aggrandisement is injurious only when it prompts individuals to endeavour to advance themselves by acting unjustly by their fellow-men; for, otherwise, it is the source of all that is most advantageous. And it is mainly for the purpose of obviating this abuse, and of protecting every one in the enjoyment of his own, that governments have been instituted. "*Hanc enim ob causam,*" says Cicero, "*maximè ut sua tuerentur, respublicæ civitatesque constitutæ sunt. Nam etsi duce natura congregabantur homines, tamen spe custodiæ rerum suarum urbium præsidia quærebant.*" (De Officiis lib. ii. c. 21.) It is visionary to imagine that the principle or instinct which makes us prefer our own interest to that of others, should ever be eradicated from the human breast. A community of labour and of goods, supposing it were established, would give the principle of selfishness a different direction from what it takes when left to itself; and would render it a source of indolence and poverty, instead of labour and wealth. But, though perverted, its power would not be lessened. Suppose you have a thousand individuals who live and labour in common: in this, as in all similar cases, it would be obvious to every one of these individuals, that if, on the one hand, he make any unusual exertions, whether of body or of mind, he will reap only the thousandth part of the advantages derivable from them; while, on the other hand, it would be equally obvious, that if he contrive to avoid

* Gibbon, Decline and Fall, cap. 44.

performing his due share of work, or obtain more than his fair proportion of its produce, he will be the sole gainer. Under such circumstances, it is clear the community would make no progress, and that it would gradually, and not very slowly, retrograde. Instead of being annihilated, the principle of self-interest would be as strong as ever; but, inasmuch as no one could expect to advance himself by industry, or frugality, a regard for his own interest would teach him to follow an opposite course, and would make him labour as little and consume as much as possible! The evils produced by a system of this description, would be so intolerable that it could not be continued. But if it were, we should, instead of the industry, enterprise, and wealth, produced by the establishment of private property, and the consequent efforts of individuals to advance themselves in the scale of society, have universal idleness, indifference, and the most abject misery. We should purchase an exemption from the crimes and disorders incident to an advanced stage of society, which the adoption of good laws and a vigilant system of police go far to repress, by the sacrifice of every thing that raises civilised man above the savage, and by diffusing the plague of poverty over every corner of the land.

Attempts to found a society upon an Agrarian Law*, or upon the principle of maintaining an equal division of land among the different families of the society, have been principally made in the view of securing the political equality of the citizens, by preventing such an increase in the fortunes of individuals as might render them dangerous to the public liberties. An agrarian law recognises

* We use the phrase "agrarian law" in its ordinary acceptation, viz., a law limiting the extent of land that may be held by individuals.

the right of private property, and is not, therefore, so much opposed to the nature of things, as a community of goods. But were it as desirable, as it is the reverse, it is not possible to limit the number or extent of estates in any considerable country; and still less is it possible to maintain their owners in nearly the same circumstances. Suppose the first settlers of an unoccupied country were to adopt this plan, it would, in less than a dozen years, be wholly subverted, and there would be the greatest inequality in their fortunes. This would arise from differences of strength, talent, and conduct; from the varying numbers and dispositions of children, and the other unforeseen accidents and occurrences which affect the circumstances of individuals. An equality of condition could not be maintained, despite such powerful causes of derangement, without taking a portion of their earnings from the industrious and frugal, to bestow them on the idle and improvident; and without resorting to other, and still more objectionable expedients. But it is unnecessary to dwell upon such crude absurdities. The distinction of rich and poor is not, as some shallow sophists would seem to suppose, artificial, but real; it is as much a part of the order of Providence, as the distinction of the sexes. It depends on the differences of the physical and mental powers and dispositions of different individuals, and of the different circumstances under which they happen to be placed; and to attempt to obliterate these distinctions by encroaching on the right of property, and enacting agrarian laws, or laws of a similar tendency, is to attempt to accomplish what is in its nature impracticable, at the expense of great and certain inconvenience and mischief.

Our readers are aware that, among the Jews, the lands were divided into equal portions, which, being distributed

by lot, became the inalienable property of the families to whom they were originally assigned. The proprietor of one of these pieces of ground might, indeed, sell the right to make use of it for a limited period; but, on the recurrence of the Jubilee, at the end of every forty-ninth year, the land reverted, without redemption, to its ancient owner, his family or heirs. Michaelis says, of this institution, that it perpetuated that equality among the citizens which was suitable to the democratic nature of the government; and farther, that it rendered it impossible for any Israelite to be born to absolute poverty, seeing that every one had his hereditary portion of land.* But, though it certainly had the first effect ascribed to it by the philosophical commentator, it is not so clear it could have the second. If a man had been compelled to part with his land some thirty, forty, or forty-five years, before the Jubilee, his family might have been during all that period, notwithstanding their reversionary claim, in the greatest destitution; and, independently of this, the prevention of poverty, to which Michaelis has alluded, could not have been realised, had not the natural progress of population been interfered with. This, however, was effected as follows:—The sons of Jewish landlords had no land of their own while their fathers lived; and having, therefore, no means of procuring an independent support for themselves, unless they emigrated to some of the towns, they were entirely dependent on their fathers, who married them when, and to whom they pleased†, preventing by this means the over-peopling of the land! It is thus that one forced and violent system begets another. If you fix and limit *à priori* the means of subsistence, you will be obliged to

* Commentaries on the Laws of Moses, i. 379.

† Jahn's Biblical Antiquities, § 152.

interfere, either directly or indirectly, with population. If not the country may be overwhelmed with pauperism.

The histories of the earlier periods of Greece and Rome furnish farther proofs of what has now been stated. In his Treatise on Politics, Aristotle states it had been the practice in sundry states of Greece to determine the maximum extent of the lands which individuals might possess; that the portions so fixed were inalienable, except in case of necessity; and he adds, that a law of Oxylus prohibited the borrowing of money on the security of such lands.* These regulations approach very closely to those of the Jews. And the reader who is curious in regard to these matters will find, in various parts of the work now referred to, a statement of the means which, in Aristotle's opinion, would be required to adjust the population to this distribution of the land. They involve the exposure of infants, and the toleration of other atrocious practices.†

The same system in regard to the limitation of the lands held by individuals prevailed in the earlier and better ages of Rome.‡ But the continued wars in which the Republic

* Politica, lib. ii. c. 4., and lib. vi. c. 2. s. 5. Oxylus appears to have been a king of the Eleans. (Pausanias, lib. v. ss. 3, 4.)

† Aristotle, *ubi suprà*, and lib. vii. c. 14.

‡ It has within these few years been contended, that there were never in fact any limits to the extent of land a citizen might hold in Rome; and that the limitation referred to above, applied only to the share of the conquered or public lands that might be appropriated by individuals. But we agree with Dureau de la Malle, and those critics who contend that there are no sufficient grounds for adopting this restricted interpretation. The extent of the conquered or public lands that might be legally held by individuals was no doubt limited; but such limitation is not inconsistent with the fact of the private estates belonging to individuals being also limited. That this was the case is distinctly affirmed by Varro, Cato, Cicero, Livy, Columella, and Pliny. In addition to this overwhelming weight of testimony, the limitation of private estates was agreeable to the practice of antiquity,

was engaged and her conquests, by occasioning a constant drain for soldiers, and affording a copious outlet for the poorer class of citizens, made the difficulty of reconciling such a division of the territory with the free growth of population, much less palpable than in the Grecian states. It did not, however, fail to manifest itself; and to impress deep, lasting, and repulsive traces on the legislation of the Republic and of the empire.

It may be observed, as some apology for the agrarian systems now alluded to, that their violent interference with the domestic concerns of individuals, and the obstacles they throw in the way of civilisation and the accumulation of wealth, were not regarded in the same light in antiquity as in modern times. In the former the interests of individuals were merged in those of the state. Martial glory and skill in public speaking were the grand objects of ambition. Commerce was generally despised; and manufactures were left to be carried on by the dregs of the populace, or by slaves. The early Greeks and Romans held wealth in little estimation; and the largest fortunes procured for their possessors only a small portion of that consideration which they afterwards brought, and still continue to bring, along with them. Hence, the rude and coarse means resorted to in the view of maintaining that equality of fortune so necessary to a purely democratic form of government, were but little objected to. They appeared to be justified by the end in view; and were

and to all that is known of Roman history. The notion, that the agrarian laws applied only to the public lands, appears to be an unwarranted inference from a statement of Appian (in his History of the Civil Wars of Rome), an Egyptian Greek, a contemporary of Adrian and Antoninus, and, therefore, of very inferior authority compared with the above named writers. (See Dureau de la Malle, E'conomie Politique des Romains, liv. iv. c. 1. and c. 4.; Fuss' Roman Antiquities, s. 143. &c.)

in harmony with the philosophy of the time. But as society advanced the older opinions gradually lost their influence. The desire to amass riches, and to attain to superior distinction by their means, may be controlled for a while, but it never can be eradicated; and is sure to manifest itself on the first opportunity. The frugality and parsimony of the old Romans might have been preserved for a comparatively lengthened period had their dominions been confined to Latium. When, however, the wealth of Italy, and of the vast countries subjugated beyond its limits, began to be poured into Rome, the economy of their forefathers was contemned by all classes. And the misfortune was, that having learned no businesses, nor acquired any habits of industry by which they might have honestly acquired fortunes, the bulk of the people were tempted to look to foreign subsidies, plunder, and bribes, as the readiest and safest means of advancing themselves. These, however, though they debauched many, could enrich but a few; so that whilst the families of the patricians, with the generals and other popular leaders, were, in the more advanced period of the Republic, mostly possessed of vast wealth, the rest of the citizens were poor, idle, venal, and rapacious. And, notwithstanding the opposition of the laws and the efforts of the Gracchi, the wealth of the former, and the poverty, corruption, and dependence of the latter, continued to increase. The middle class was, at length, all but extinguished. And the descendants of the conquerors of Pyrrhus and Hannibal eventually became the submissive slaves of despots who supplied them with bread and shows—*Panem et circenses.*

The legislators of France are entitled to the credit of having introduced a system with respect to the suc-

cession to property, better fitted to perpetuate equality of fortune than the schemes to which we have thus briefly alluded.* The French system does that indirectly which they did directly; and it has the advantage of appearing to be bottomed on the fairest principles, and of making a man's property be distributed equally among those whose claims to it are equal. But in other respects they are nearly upon a level. The saying of Michaelis, that every Jew was born to land, may be applied with as much truth to the majority of Frenchmen. But, instead of being, as he supposed, a security against pauperism, this dependence on land is the most efficient stimulus to its increase. We have noticed the devices by which its influence in this respect was modified in Judæa, Greece, and Italy. Happily, however, the spirit of modern times will not permit even the most desirable results to be brought about by such contrivances; so that in France the system will be left to its natural course, or will be countervailed only by the sagacity and self-denial of those subject to its operation.

But though it were possible, which it is not, to obviate the mischievous influence of the French and other plans for preventing the increase and continuance of property in the same families, it may be confidently predicted that they will, in time to come, as hitherto, wholly fail in their grand object of perpetuating the ascendency of the democracy. In old settled, and fully peopled countries, where the bulk of the population is necessarily poor and dependent, an aristocracy is indispensable for the support of a free system of government. "Il importe à tous les peuples

* We have already seen, that the learned and judicious M. Dureau de la Malle has expressed his surprise that the ancients did not attempt to enforce the principle of equal succession. (See *antè*, p. 20.)

qui ont la prétention de devenir ou de rester puissants, d'avoir une aristocratie, c'est-à-dire un corps héréditaire ou non, qui conserve et perpetue les traditions, donne de l'esprit de suite à la politique, et se voue à l'art le plus difficile de tous, qu' aujourd'hui cependant tout le monde croit savoir sans l'avoir appris, celui de gouverner. Un peuple sans aristocratie pourra briller dans les lettres et les arts, mais sa gloire politique me semble devoir être passagère comme un meteore."* With the exception of Sparta, Carthage, and Rome, in all of which there was a strong infusion of the aristocratic element, none of the ancient republics survived for any considerable period; but, either fell under the sway of tyrants, or were torn and convulsed by the fierce and bloody contests of rival factions. A powerful and widely ramified aristocracy, like that of England, not resting for support on any oppressive laws, and enjoying no privileges but which are for the public advantage, is necessary to give stability and security to the government, and freedom to the people. And our laws in regard to succession being well fitted to maintain such an aristocracy, and, at the same time, to inspire every other class with the full spirit of industry and enterprise, to change them would not be foolish merely but criminal, — a *lèse-majesté* against the public interests. They have been highly instrumental in procuring for us a greater amount of public and private freedom, comfort, and enjoyment, than has ever fallen to the lot of any other people. And such being the case their overthrow, if it ever take place, should be the act of others and not of ourselves.

* Chevalier, Lettres sur l'Amérique, ii. 379.

APPENDIX.

No. I.

Act of the Scotch Parliament, 1 James VII. c. 22., 1685, establishing Perpetual Entails.

Our Sovereign Lord, with advice and consent of his Estates of Parliament, statutes and declares, that it shall be lawful to his Majesty's subjects to tailzie their lands and estates, and to substitute heirs in their tailzies with such provisions and conditions as they shall think fit; and to affect the said tailzies with irritant and resolutive clauses, whereby it shall not be lawful to the heirs of tailzie to sell, annailzie, or dispone the said lands, or any part thereof, or contract debt, or do any other deed whereby the same may be apprised, adjudged, or evicted from the others substitute in the tailzie, or the succession frustrate or interrupted; declaring all such deeds to be in themselves null and void; and that the next heir of tailzie may immediately, upon contravention, pursue declarators thereof, and serve himself heir to him who died last infeft in the fee, and did not contravene without necessity anyways to represent the contravener. It is always declared that such tailzies shall only be allowed in which the aforesaid irritant .and resolutive clauses are inserted in the procuratories of resignation, charters, precepts, and instruments of seisin; and the original tailzie once produced before the Lords of Session judicially who are hereby ordained to interpose their authority thereto; and that a record be made in a particular register-book, to be kept for that effect, wherein shall be recorded the names of the maker of the tailzie, and of the heirs of tailzie, and the general designations of the Lordships and Baronies, and the provisions and conditions contained in the tailzie, with the aforesaid irritant and resolutive clauses subjoined thereto, to remain in the said register *ad perpetuam rei memoriam*. And for which record there shall be payed to the Clerk of Register and his deputes the same dues as are paid for the registration of seisins, and which provisions and irritant clauses shall be repeated

in all the subsequent conveyances of the said tailzied estate to any of the heirs of tailzie. And being so insert, his Majesty, with advice and consent foresaid, declares the same to be real and effectual, not only against the contraveners and their heirs, but also against their creditors, comprisers, adjudgers, and other singular successors whatsoever, whether by legal or conventional titles.

It is always hereby declared, that if the said provisions and irritant clauses shall not be repeated in the rights and conveyances, whereby any of the heirs of tailzie shall brook or enjoy the tailzied estate, the said omission shall import a contravention of the irritant and resolutive clauses against the person and his heirs who shall omit to insert the same, whereby the said estate shall, *ipso facto*, fall, accresce, and be devolved to the next heir of tailzie, but shall not militate against creditors and other singular successors who shall happen to have contracted *bonâ fide* with the person who stood infeft in the said estate without the said irritant and resolutive clauses in the body of his right. And it is further declared, that nothing in this act shall prejudge his Majesty, as to confiscations or other fines, as the punishment of crimes, or his Majesty or any other lawful superior of the casualties of superiority which may arise to them out of the tailzied estate; but these fines and casualties shall import no contravention of the irritant clause.

No. II.

Act 10 Geo. III. c. 51., 1770, to encourage the Improvement of Lands, Tenements, and Hereditaments, in that Part of *Great Britain* called *Scotland*, held under Settlements of strict Entail.

Whereas by an act of the Parliament of Scotland, made in the year 1685, intituled "Act concerning Tallies," all his Majesty's subjects are empowered to tallie their lands and estates in Scotland with such provisions and conditions as they shall think fit, and with such irritant and resolutive clauses as to them shall seem proper; and which tallies, when completed and published in the manner directed by the said act, are declared to be real and effectual against purchasers, creditors, and others whatsoever: and whereas many tallies of lands and estates in Scotland, made as well before as after passing the said act, do contain clauses limiting the heirs of entail from granting tickets or leases of a longer endurance than their own lives, for a

small number of years only, whereby the cultivation of land in that part of this kingdom is greatly obstructed, and much mischief arises to the public; and which must daily increase, so long as the law allowing such entails subsists, if some remedy be not provided: wherefore, to prevent a mischief and inconveniency so hurtful to the public, be it enacted by the King's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that it shall and may be lawful to every proprietor of an entailed estate within that part of Great Britain called Scotland, to grant tacks or leases of all or any part or parts thereof, for any number of years not exceeding fourteen years from the term of Whitsunday next after the date thereof, and for the life of one person to be named in such tacks or leases, and in being at the time of making thereof; or for the lives of two persons to be named therein, and in being at the time of making the same, and the life of the survivor of them; or for any number of years, not exceeding thirty-one years from the term aforesaid.

2. Provided always, that every such lease for two lives shall contain a clause obliging the tenant or tenants to fence and inclose, in a sufficient and lasting manner, all the lands so leased within the space of thirty years, and two third parts thereof within the space of twenty years, and one third part thereof within the space of ten years, if the said lease shall continue for such respective terms; and that every such lease for any term of years, exceeding nineteen years, shall contain a clause obliging the tenant or tenants to fence and inclose in like manner all the lands so leased during the continuance of such term, and two third parts thereof before the expiration of two third parts of such term, and one third part thereof before the expiration of one third part of such term.

3. And provided also, that every such lease for two lives, or for any term of years exceeding nineteen years, shall contain a clause obliging the tenant or tenants to keep and preserve the fences, when made, in good and sufficient repair during the lease, and to leave them so at the expiration thereof; and that no inclosures which shall be made, shall comprehend more than forty acres in one field; excepting where the lands consist of hills or other grounds, incapable or improper by their nature for culture by the plough; in which case, the inclosures may be made of such extent as the nature of the ground shall require.

4. And whereas the building of villages and houses upon entailed estates may, in many cases, be beneficial to the public, and might often be undertaken and executed, if heirs of entail were impowered to encourage the same by granting long leases of lands for

the purpose of building; be it therefore enacted by the authority aforesaid, that it shall be, and it is hereby declared to be, in the power of every proprietor of an entailed estate, to grant leases of land for the purpose of building, for any number of years not exceeding ninety-nine years.

5. Provided always, that not more than five acres shall be granted to any one person, either in his own name, or to any other person or persons in trust for him; and that every such lease shall contain a condition that the lease shall be void, and the same is hereby declared void, if one dwelling-house at least not under the value of ten pounds sterling, shall not be built within the space of ten years from the date of the lease, for each one half acre of ground comprehended in the lease; and that the said houses shall be kept in good, tenantable and sufficient repair; and that the lease shall be void whenever there shall be a less number of dwelling-houses than one of the value aforesaid, to each one half acre of ground kept in such repair as aforesaid, standing upon the ground so leased.

6. Provided also, that the power of leasing hereby given shall not in any case extend to, or be understood to comprehend, a power of leasing, or setting in tack, the manor-place, office-houses, gardens, orchards, or inclosures adjacent to the manor-place, which have usually been in the natural possession of the proprietor, or have not been usually let for a longer term than seven years, when the heir in possession was of lawful age; and that no lease of lands shall be granted under the authority of this act, for the purpose of building villages or houses within three hundred yards of the manor-place in the natural possession of the proprietor.

7. Provided always, and be it enacted, that all leases made or to be granted under the authority of this act, shall be made or granted for a rent not under the rent payable by the last lease or sett, and without grassum fine or foregift, or any benefit whatsoever, directly, or indirectly, reserved or accruing to the grantor, except the rent payable by the lease; and that no such lease shall be granted till after the end or other determination of any former lease of the same premises; or that such lease, if granted for a time certain, shall be within one year of being determined; and that all leases otherwise granted shall be void and null.

8. And be it provided and declared by the authority aforesaid, that if any taillie shall, either expressly or by implication, contain powers of leasing more ample than are hereby given, the heirs of entail in possession shall be at liberty to exercise all such powers, in the same manner as if this act had never been made.

9. And whereas it may be highly beneficial to the public, if proprietors of entailed estates were encouraged to lay out money in in-

closing, planting, or draining, or in erecting farm-houses, and offices or out-buildings for the same, upon their entailed lands and heritages: and whereas such proprietors may be induced and encouraged so to do, if they, their executors and assigns, were secured in recovering a reasonable satisfaction, for the money expended in making such improvements, from the succeeding heirs of entail; be it therefore enacted by the authority aforesaid, that every proprietor of an entailed estate who lays out money in inclosing, planting, or draining, or in erecting farm-houses, and offices or out-buildings, for the same, for the improvement of his lands and heritages, shall be a creditor to the succeeding heirs of entail for three fourth parts of the money laid out in making the said improvements.

10. Provided always, that the sum or sums of money laid out upon such improvements, by any one heir of entail during his or her possession, shall not, in any case whatever, be effectual to constitute a claim against the succeeding heir of entail, for more than four years' free rent of the said entailed estate, after deduction of all public burdens, life-rents, and interests of debts, which may affect the said estate, as the same shall happen to be at the first term of Whitsunday after the death of the heir who expended the money claimed.

11. Provided also, that every proprietor of an entailed estate, who intends to lay out money on such improvements, shall, three months at least before he begins to execute the same, give notice in writing to the heir of entail next entitled to succeed to the said estate after the heirs of the body of the said proprietor, if within Great Britain or Ireland, and if the heir next entitled to succeed is not within Great Britain or Ireland, shall give notice in writing to the nearest male relation by his father of lawful age, or to his known factor or attorney, of such his intention, specifying in such notice the kind of improvement intended, and the farms or parts of the estate upon which the improvements are intended to be made; and shall lodge a copy thereof with the sheriff or steward-clerk of the county wherein the lands lie.

12. Provided likewise, that the proprietor of an entailed estate, who lays out money in making improvements upon his entailed estate, with an intent of being a creditor to the succeeding heirs of entail in the manner above expressed, shall annually, during the making such improvements, within the space of four months after the term of Martinmas, lodge with the sheriff or steward-clerk of the county within which the lands and heritages improved are situated, an account of the money expended by him in such improvement during twelve months preceding that term of Martinmas, subscribed by him, with the vouchers by which the account is to be supported when payment shall be demanded or sued for.

13. Provided also, and be it further enacted, that when a sum equal

to four years' free rent shall have been laid out, in manner above mentioned, by one or more heir or heirs of entail, and shall remain a subsisting charge against the succeeding heirs, it shall not be lawful for any subsequent heir or heirs to lay out any more money under the authority of this act, for any of the improvements aforementioned.

14. And be it enacted by the authority aforesaid, that all sheriff or steward-clerks, with whom the accounts, vouchers, and copies of notice shall be lodged, shall, within the space of one month thereafter, record them in a book to be kept for that purpose, and return them when called for; and shall make the book patent to all persons desirous to see the same; and shall give certified copies or extracts of all accounts, vouchers, and copies of notice recorded, they receiving for their trouble the usual fees for recording writings and giving out extracts, and sixpence sterling from each person who shall have inspection of the book wherein the accounts, vouchers, and copies of notice shall be recorded.

15. And be it enacted by the authority aforesaid, that the executor or executors, assignee or assigns, or other person or persons, having right to the claim arising from money expended by the proprietor of an entailed estate in the improvement thereof, may, after the expiration of one year from the death of the heir who expended the money require the heir next succeeding to the estate to pay such part thereof as is due by the authority of this act, with the legal interest, from the term at which the succeeding heir's right to the rents of the estate did commence, upon receiving a proper discharge and assignment of the said claim; and if the money is not paid within three months of such requisition, it shall then be lawful for the person or persons having right, to institute an action in the court of session against the heir then in possession, for compelling him to pay the money, and interest thereof; and upon obtaining a decree, he, she, or they shall be at liberty to use every kind of diligence or execution, authorized by the law of Scotland in recovering payment of debts, excepting adjudication against the entailed estate improved; and in all questions of competition for the rents of the entailed estate, the person or persons who have sued for and obtained a decree under the authority of this act, or the person or persons having right to such decree, shall be preferred to the other creditors of the heir of entail who has succeeded to the estate.

16. Provided always, that when any heir in possession is sued for the money due on account of improvements made upon an entailed estate under the authority of this act, he shall be discharged in all cases from such suit, upon his assigning and effectually conveying to the creditor or creditors one third part of the clear rents of the entailed

estate, during his life, or until the money so due shall thereby be paid off and discharged.

17. And whereas it may happen that the heir of entail, who next succeeds the proprietor who expended the money in the improvement of the entailed estate, may die, before the money due by him on account of improvements made upon the estate is paid, by which the person or persons in the right of the money due may be embarrassed in recovering payment: for remedy whereof, be it enacted by the authority aforesaid, that the person or persons in the right of the money due may either sue the heirs and successors of the said next heir of entail in any other than the entailed estate, or the heir of entail next succeeding to him, or both, and use every kind of diligence or execution, authorized by the law of Scotland in the recovering payment of debts, against them and their estates, excepting adjudication against the entailed estate, until the money due is fully satisfied and paid; and the person or persons in the right of the money due shall, in any competition for the rents of the entailed estates, be preferred to the personal creditors of the heir of entail in possession; and the person or persons in the right of the money due, in like manner shall be entitled to sue every succeeding heir of entail, until the money is satisfied and paid; and shall have the same preference to the rents of the entailed estate in competition with the creditors of such heirs of entail.

18. Provided always, and be it enacted by the authority aforesaid, that the heir who next succeeds in the entailed estate to the proprietor who expended the money, under the authority of this act, in making improvements upon the estate, and the heirs and successors of such heir, shall be bound to relieve all subsequent heirs of all or such parts of the debt, incurred by the improvement of the estate under the authority of this act, as shall be paid by them, to the extent of one third part of the rents which have come to the use of such first succeeding heir, or to the use of his heirs or executors; and when the third part of the rents which have come to the use of the first succeeding heir, or to his heirs or executors, are exhausted, then the next succeeding heir, and his heirs and successors, shall in like manner be bound to relieve all subsequent heirs, to the extent of one third part of the rents which have come to their use; and relief shall in like manner be competent to every succeeding heir who shall pay, against the heirs and successors of the preceding heir.

19. Provided also, and be it enacted by the authority aforesaid, that when the heirs and successors of an heir of entail, in any other than the entailed estate, are sued for the money due on account of improvements made upon an entailed estate under the authority of this act, they shall be discharged in all cases from such suits, upon

making payment of one third part of the rents of the entailed estate which have come to the use of such heir of entail, or to the use of his said heirs or successors.

20. And whereas inconveniencies and confusion might arise from the executor, assignee, or other person or persons having right to the claim arising from money expended by the proprietor of an entailed estate in the improvement thereof, their not timeously requiring the heir next succeeding in the estate to pay what they are entitled to receive by authority of this act, and suing such heir to compel him to pay, if payment is not made: for remedy whereof, be it enacted by the authority aforesaid, that the executor, assignee, or other person or persons having right to the claim arising from money expended by the proprietor of an entailed estate in the improvement thereof, shall be obliged, within the space of two years after the death of the proprietor who expended the money, to require payment from the succeeding heir; and within the space of six months after the elapse of the said two years, to institute an action, if the money is not paid, in the court of session; and to proceed without delay in recovering a decree for the sum due, and doing exact diligence for recovering payment thereof, or at least to the amount of one third part of the free rents of the estate which shall have become due to such succeeding heir.

21. Provided always, and be it enacted by the authority aforesaid, that the executor, assignee, or other person or persons, having right to the claim arising from money expended by the proprietor of an entailed estate, who shall neglect to require the next, or any other succeeding heir or heirs to pay, and shall allow such succeeding heir or heirs to die without recovering payment from him or them to the amount of one third part, at least, of the rents that shall have become due to such heir or heirs, shall cease to be creditor to the subsequent succeeding heir or heirs respectively, to the extent of one third part of the rents which shall have become due to the heir or heirs so deceasing as aforesaid; and shall be entitled to recover payment of his claim to the extent of such third part of the rents, from the executors or heirs only of the first or any other succeeding heir or heirs, in any other estate than the entailed estate; and shall be entitled to recover payment of the surplus of his claim, if any be, and no more from the subsequent succeeding heir or heirs respectively.

22. And whereas it may happen that the heir, who next succeeds to the proprietor who expended money in making improvements upon an entailed estate, may pay all or part of the money due on account of such improvements, and may not live so long as to be indemnified by the third part of the rents which shall come to his use, or to the use of his heirs or executors; be it therefore enacted by the authority aforesaid, that if the heir who first succeeds in the en-

tailed estate to the proprietor who expended the money, does pay all or part of the money due on account of the improvements made, and shall not live long enough to be indemnified of what he pays by one third part of the rents that shall come to his use, or to the use of his heirs or executors, it shall be competent to his executors or assigns to sue the succeeding heir of entail for relief of such part of the money as shall not be repaid by the third part of the rents which have come to his use, or to the use of his heirs or executors; and relief shall in like manner be competent to the executors or assigns of every heir of entail who pays more than is repaid by the third part of the rents which have come to his use, or to the use of his heirs and executors.

23. And be it further enacted by the authority aforesaid, that no money expended in making improvements upon an entailed estate, for which a decree shall be obtained in the court of session, shall be made use of as a ground of debt for adjudging the estate upon which the improvements have been made; and if any decree of adjudication shall be obtained against the entailed estate for such debts, every such decree shall and is hereby declared to be void.

24. And be it also enacted by the authority aforesaid, that if the heir of entail who shall succeed to an entailed estate upon which improvements have been made, shall have right to a claim of debt arising from the making of such improvements as next of kin, or by the will or settlements of the heir of entail who expended the money; in every such case, the claim of debt shall and is hereby declared to be extinguished for ever, and shall never be set up as a debt against any succeeding heir.

25. And be it further enacted by the authority aforesaid, that if any heir of entail, against whom a debt is created for improvements made on the entailed estate to which he succeeds, shall refuse to pay the money required of him under the authority of this act, and that decrees shall be obtained against him for the whole of the sum or sums of money of which he shall be required to make payment; in every such case the defender shall be liable in full costs of suit; and if decree is not obtained for the full sum or sums of money of which payment has been required, it shall be in the discretion of the court to award costs of suit to either party, as the justice of the case shall direct.

26. And whereas questions may arise concerning the amount of the sums laid out under the authority of this act, at a great distance of time, when the material witnesses may be dead: for remedy whereof, and for ascertaining, in due time, the amount of the sums so expended; be it therefore further enacted, that it shall and may be lawful for every heir of entail, after he shall have laid out money upon the improvement of his entailed estate as aforesaid, and shall have completed the improvement of all or any particular part of such estate,

to bring, if he shall think proper, an action of declarator before the court of session, or a process before the sheriff, in which he shall call the heir next entitled to succeed after the heirs of his own body, and shall in such suit produce proper evidence of the money laid out in such improvements; and the said next heir, or any other heir of entail, shall be entitled to produce proper evidence to set aside or diminish the said claim: and it shall and may be lawful for the said court of session, or for the said sheriff, to pronounce a decree for such part of the said sum as, by the true intent and meaning of this act, is intended to become a charge against the succeeding heirs in the said entailed estate; which decree, if pronounced by the sheriff, shall become final, unless carried to the court of session by suspension within six months after the same shall have been pronounced; and if pronounced by the court of session, either in such process of declarator or suspension, shall be final, if an appeal is not brought within twelve months.

27. And whereas it frequently happens that there are not, upon entailed estates, mansion-houses and offices suitable to the estates, and fit for the accommodation of the heirs of entail; and that mansion-houses and offices upon entailed estates are sometimes destroyed by fire, or from other accidental causes, or become insufficient by length of time; and it being beneficial to the public to encourage heirs of entail, in such cases, to build houses and offices suitable to their estates, and fit for the accommodation of their families; be it therefore enacted by the authority aforesaid, that every heir of entail who lays out money in building a mansion-house or offices, or in repairing or adding to the mansion-house or offices upon his estate, shall be a creditor to the next succeeding heir of entail for three-fourth parts of the money expended by him.

28. Provided always, that the sum or sums of money laid out by any one heir of entail, in the building a mansion-house or offices, or in the repairing or adding to the mansion-houses or offices, shall not, in any case whatever, be effectual to constitute a claim against the succeeding heir of entail for more than two years' rent of the said entailed estate, after deduction of all public burdens, life-rents, and interests of debts, which may affect the said estate, as the same shall happen to be at the first term of Whitsunday after the death of the heir who expended the money claimed.

29. Provided also, that the proprietor of the entailed estate, who lays out the money shall, previous thereto, give notice in writing to the heir of entail next entitled to succeed to the said estate after the heirs of his own body, and record copies of the same, together with the accounts of the money expended, and the vouchers thereof, in the sheriff or steward court books of the county within which the mansion-houses and offices are situated, in the form and manner above

directed with regard to monies expended in making improvements upon entailed estates.

30. And be it enacted by the authority aforesaid, that the executor or executors, assignee or assignees, or other person or persons having right to the claim arising from money expended by the proprietor of an entailed estate, in the building a mansion-house or offices, or in the repairing or adding to the mansion-house or offices upon his estate, may, after the expiration of one year from the death of the heir who expended the money, require the heir next succeeding to the estate to pay the whole, or such part thereof as is due by the authority of this act, with the legal interest from the term at which the succeeding heir's right to the rents of the estate did commence, upon receiving a proper discharge and assignment of the said claim; and if the money is not paid within three months of such requisition, it shall be lawful for the person or persons having right to sue the next succeeding heir, in the manner above directed for the recovering of money expended in the improvement of entailed estates.

31. And be it further enacted by the authority aforesaid, that the same rules of relief among succeeding heirs of entail, and their heirs and successors, of the claim of debt, and of preference in competition for rents, and in subjecting defenders to the payment of costs, and for ascertaining the amount of the sum laid out, shall take place with regard to monies expended in the building, repairing, or adding to the mansion-houses or offices upon entailed estates under the authority of this act, as are before enacted, with respect to monies expended by proprietors of entailed estates, in making improvements upon their estates for increasing the rents and value of them.

32. And whereas it may frequently happen, that the inclosing of lands in Scotland may be retarded or prevented, or at least rendered inconvenient, by heirs of entail not having it in their power to exchange small parcels of the lands of their entailed estates for other lands convenient for the entailed estate, and more conducive to the improvement of the country in general: for remedy whereof, be it enacted by the authority aforesaid, that it shall and may be lawful for proprietors of entailed estates to excamb or make exchanges of land, with all and every person or persons, for the conveniency and advantage of the said estates, and for the improvement of the country where such estates are situated, by inclosing or otherways.

33. Provided, that not more than thirty acres of arable land, nor more than one hundred acres of lands consisting of hills or other grounds incapable or improper by their nature for culture by the plough, of such entailed estates, lying together in one place or plot, shall be given in exchange; and that an equivalent in land, contiguous to the entailed estate with which the exchange is to be made, shall be

received in place of the land given in exchange: and for ascertaining and adjusting the value of the lands proposed to be exchanged, an application shall be made for that purpose, by the proprietor of the entailed estate, to the sheriff or steward of the county within which the entailed estate is situated, who thereupon shall appoint two or more skilful persons to inspect and adjust the value of the lands proposed to be excambed or exchanged, and upon such person settling the marches of the lands proposed to be exchanged, and reporting upon oath that the exchange will be just and equal, the sheriff or steward may, and is hereby required to authorize the exchange to be made by a contract of excambion; and which being executed and recorded in the sheriff or steward books within three months after the execution thereof, the same shall be effectual to all intents and purposes; and the land given in exchange to the entailed estate shall be held to be a part thereof, and shall be subject to all the prohibitory, irritant, and resolutive clauses of the entail in the same manner as if it had been originally a part of the estate; and the lands given from the entailed estate shall from thenceforth be held as out of the entail, and be liberated from all the prohibitory, irritant, and resolutive clauses thereof.

34. And be it further enacted and declared by the authority aforesaid, that this act shall extend to, and comprehend, all tallies of lands or heritages in that part of Great Britain called Scotland, made or to be made, and whether prior or posterior to the said act made in the year one thousand six hundred and eighty-five.

No. III.

Account of the Metayer System of Letting Land (p. 99.), from an Article on the Agriculture of France, in the Révue Trimestrielle, for April, 1828.

'Quand les propriétaires ne cultivent pas eux-mêmes leurs terres, le mode de leur loyer est la circonstance la plus influente sur l'état de leur culture. *Ce mode en France est généralement détestable.* A l'exception de la Flandre et de ce très-petit nombre de provinces où le système de la culture alterne est suivi depuis très long-temps, la durée des baux est beaucoup trop courte, pour que le fermier ait le temps de recouvrer les dépenses que nécessite l'établissement d'une nouvelle méthode de culture et pour retirer quelques avantages de ce changement. Enfin, dans une très-grande partie du royaume, dans toutes les provinces du centre, les fermiers sont à peine connus.

Les terres sont cultivées par de malheureux *métayers*, travailleurs à moitié fruit, qui se chargent pour trois ans de tous les travaux de la culture, et qui doivent rendre au propriétaire la moitié de ses produits bruts. Le métayer apporte ses bras, son ignorance et son bon appétit; le propriétaire lui confie un sol épuisé, tout le mobilier indispensable à sa chétive exploitation, le grain nécessaire au premier ensemencement, et même celui qui doit le faire subsister lui et sa famille, jusqu'à la première récolte. Le métayer laboure, sème, moissonne, et vit là-dessus. Lui et les siens repus, le propriétaire a la reste. Quelquefois, entre le propriétaire et le métayer, qui est un pauvre paysan, il s'interpose sous le nom de fermier un troisième individu, le plus souvent un petit bourgeois de village, très-rusé, qui assure au premier sur le produit du travail du second un petit revenu fixe et indépendant de l'abondance et du prix des récoltes. Cet homme ne prend aucune part active aux travaux de la culture, mais il assiste à tous les dépouillements de récolte que fait le métayer, il le suit à tous les marchés pour s'emparer de la moitié qui lui est due de tous les produits; son habileté consiste à prendre au delà de cette moitié sur la part du métayer; comme il sait lire et ecrire, et qu'ordinairement le métayer ne le sait pas, il a beaucoup d'avantage sur lui pour embrouiller les comptes, et finalement le voler. Sous ce maître toujours présent la condition du métayer est encore bien plus misérable. Ce fermier qui a généralement quelques avances, paie la rente du propriétaire avec assez de régularité; il fait de petites spéculations sur la vente de ses denrées, et quelquefois il s'enrichit. Cette combinaison est assez commode pour le propriétaire, qu'elle décharge de toute surveillance, et auquel elle offre quelque garantie de payement: mais elle est ruineuse pour la culture parce qu'elle maintient dans une extrême misère le métayer, qui cultiverait moins mal s'il pouvait faire quelques profits et quelques épargnes dans les anées d'abondance; elle l'empêche de s'élever jamais à la condition de fermier-cultivateur; elle fait passer dans la poche de la ruse la récompense du travail."

No. IV.

Queries submitted to the late Mr. Oliver, tenant of Lochend and Millrig, in Mid Lothian, an extremely intelligent, practical farmer, with his answers to the same.

Query 1.—Would it be advantageous to the agricultural interest of Scotland were the tenants, especially those in the best cultivated districts, vested with the power of subletting their farms?

2.— Supposing that the tenants in the districts referred to had power to divide their farms, and to devise them by will, what would be the probable influence of such power on the agriculture of the country, and the condition of the tenants?

Replies, by Mr. Oliver, to the above Queries.

" I.—With respect to the *first* of these queries, it appears to me, that though the tenantry were vested with the power of subletting, no great change in the present mode of managing and occupying land in Scotland would be likely to take place for some considerable time. The practice of letting land in this country on leases of nineteen years having been quite general for nearly a century, and the power of subletting having been very rarely conceded, the lands have naturally fallen into the occupancy of that class of persons who engage in the business of agriculture with the full purpose of devoting their lives to it. Persons of this description would not be very likely immediately to avail themselves of the privilege of subletting. A considerable time would be necessary to produce so great a change in their habits and views; but that it would be gradually produced, were the privilege granted, is, I think, certain. Much of the superiority of Scotch agriculture is ascribable to the steady, enterprising character of the cultivators; and the system of letting lands upon leases for a definite number of years, with the prohibition of assigning or subletting, has contributed largely to the formation of that character and enterprise. A man entering upon a lease for nineteen or twenty-one years with the knowledge that it is not in his power to transfer it to another; and that his interest in the farm will terminate at the expiration of the stipulated period, is stimulated to a vigorous and early execution of the necessary improvements, as he knows that the longer they are delayed the more will the profits derivable from them be diminished. To produce this effect, it is indispensable that the lessee or his heir at law should possess the farm during the continuance of the lease; and consequently that there should be no power to assign or sublet. Many persons who probably would not avail themselves of such a power, might notwithstanding, were it granted, hesitate about subletting, and the effects of this hesitation would very soon appear on the management of the farm. It may, perhaps, be supposed that the power to sublet would not make a farmer lessen his exertions, as the more the lands were improved, the more would they be worth. This would no doubt be the case to a certain extent; but it must be recollected, that a tenant resolved to occupy a farm, has only to satisfy himself that an improvement will be profitable; whereas if he intend to sublet, or is hesitating about it, he must feel that his remuneration

is to depend upon his being able to satisfy those who are to be his sub-tenants that the money expended will be returned with a profit. Tenants so situated are, therefore, naturally led to execute such improvements as most readily strike the eye, and appear advantageous; while those really beneficial ones that they would have executed, had they been certain from the beginning that they would have to occupy the farms to the close of their leases, are either not thought of at all, or are postponed. For these and other reasons which it is needless to state, it appears to me that the mode of letting lands upon leases for fixed and definite periods, without the power of subletting or assigning, is the best, and promotes in the greatest degree the interests of the proprietors and tenants. Nor do I think that any other term could be advantageously substituted for the one almost universally adopted in Scotland, viz. nineteen years. Nineteen or twenty-one years afford ample space for advantageously executing most strictly agricultural improvements, while the term is not so extended as to encourage either dilatoriness or sloth in the tenant. Being thus clearly of opinion that the system of letting farms on leases of nineteen years, excluding the power to assign or sublet, has been one of the principal means of creating a class of cultivators in this country superior, I may venture to say, to those in most others, and indeed the only class in whose hands agriculture can permanently flourish, I should consider any thing that had any tendency, however slight, to introduce any lower description of tenants as injurious. But the granting of a power to sublet would not have a slight effect. It would slowly, perhaps, but, as I think, certainly, bring about a change for the worse in our views and habits; and would most probably draw into the profession, especially in periods of agricultural prosperity, persons disposed rather to speculate on subletting their farms at an additional rent, than to occupy them during the currency of the lease.

"I know that many well-informed persons have thought that the privilege of subletting is reasonable and would prove beneficial to agriculture. They contend that enterprising tenants, possessed of adequate skill and capital, would be of essential service to agriculture, and would, at the same time, add largely to their own profits, by hiring farms that require improvement, provided they could sublet them, after they had been improved, to tenants of less capital; so that, by granting power to sublet, the country would be more rapidly improved, while an extensive field would be laid open for the operations of the superior class of tenants. If any such division of agricultural skill and capital could be really effected, it would no doubt prove beneficial; but I look upon it as altogether impracticable. No prudent tenant will ever trust, for the repayment of money laid

out on improvements, to the management of a person of inferior skill and means: if he do, he will, when too late, discover his error. Among tenants, as in every other class, skill and the command of capital are much oftener found united in the same individual with caution, than with that sort of speculative enterprise which would lead to the contemplated division. Instead then of the privilege of subletting farms *entire and undivided* (for I have hitherto considered it only in that point of view) being a thing likely to prove advantageous either to agriculture or to the tenantry in general, I feel satisfied that it would be injurious to both. The injury, however, would be aggravated in a tenfold degree, were the power to *subdivide* farms conferred along with the power to sublet. With this additional impulse, the system of subletting, and the annihilation of the existing race of cultivators, would proceed at a greatly accelerated rate. Such a state of things could scarcely fail of ultimately reducing agriculture to the lowest state of degradation, by introducing a class of tenants possessing neither skill nor capital adequate to the proper cultivation of the soil.

"The strong desire of the majority of those, a single remove or two above the condition of labourers, to possess a piece of land, has been unequivocally established by the experience of every country where facilities for its gratification have been afforded. And that this desire should exist and be exceedingly powerful, is not matter of surprise. Every one wishes to be independent; and many are but too apt to consider that when they have got a lease of as much land as will furnish them with milk, meal, potatoes, and other articles forming the chief part of their sustenance, and a house, (to which, in their estimation, no part of the rent is ever charged,) they have attained, or at least made, a great advance on the road to independence. They seldom consider that the same articles might be procured at a smaller cost from those who make agriculture their business, and who possess the means of calling forth all the energies of the soil. But even if they consider this, it is not very likely it would make them alter their mind. There is a pleasure, independently altogether of considerations of profit or loss, in being supplied with commodities produced on our own farm, and under our own superintendence. They are distributed with a more liberal hand, and are more freely consumed, than articles procured by a direct outlay of money, and which can only be replaced by a repetition of the same unpalatable application to the pocket. But there are other considerations which exercise, perhaps, a still greater influence in leading people in inferior circumstances to take farms. The additional local influence and importance they acquire by becoming farmers, stimulates them to offer for land. But it is obvious that they could not obtain

possession of lands except by offering exorbitant rents. No tenant will divest himself of a portion of his farm, unless he receive not only the rent payable to the landlord, but also all, or nearly all, the profit he made by it; and if the farm were fully rented when undivided, it follows that, though it were let without any additional rent, it must be too high when split down into a number of small farms; for agricultural operations, supposing an equality of skill, can never be so well executed on a small scale, as on a large one; admitting of a proper subdivision of labour and of the employment of machinery. No doubt a considerable length of time would be required, as formerly stated, to bring the system of subletting and subdividing into full operation in a country occupied like Scotland, by tenants whose views and habits are at present so little congenial to such practices. Still, however, there appear to be sufficient grounds for thinking, that the strong desire of a very large class of persons to possess themselves, on almost any terms, of a piece of land, would lead them to offer rents greatly beyond its real worth, for purely agricultural purposes. And there can be no doubt that the offer of this additional rent would operate powerfully, in the long run, to induce farmers to split down and sublet their farms. For, although the additional rent promised would, in the majority of instances, be ill-paid, still the temptation, especially after the system had once been introduced, would in numberless instances prove too great for the farmer to resist. That matters would sooner or later reach this state, were the power of subletting and dividing their farms conferred upon the tenantry, is, in my apprehension, quite certain; and under such a state of things, agriculture would retrograde almost as rapidly as it has advanced during the last century. The agriculture of every country in Europe, in ancient and in modern times, has been prosperous or the reverse in proportion to the capital and skill of the *actual cultivators* of the soil. To this rule, the history of agriculture, so far as I know, affords no exception. Indeed so inseparably is bad cultivation linked with tenants of an inferior description, that even in Scotland, where the business of husbandry is now so well understood, it is still the rarest thing imaginable to find a small farm, of from twenty to fifty acres, that would not be a disgrace to the cultivators of a century ago. It seems to me quite as unreasonable to suppose that agriculture should not be injured by the introduction of the species of tenants that would gradually overspread the country, were the power of subletting and splitting farms granted, as that the speed of her Majesty's mails should not be retarded, were London dray-horses made to supplant the high-mettled breed at present in use.

"II.—With respect to the second query:—Supposing, in the first place, that the tenants were vested with the privilege of dividing and

devising their farms by will to heirs-male, but were debarred from assigning or subletting to any other description of persons, I am disposed to think that great injury would ultimately ensue to agriculture from such a privilege. The operation of this measure would, however, be for some time not very obvious, at least to those unacquainted with the practical details of agriculture: and for a considerable time, perhaps, its effects would be little felt. Since the American war, Scotch cultivators have had the utmost desire to enlarge their farming concerns; and where that could not be done by obtaining leases of contiguous lands, additional farms at the distance of five, ten, or even twenty miles from the tenant's place of residence, have frequently been had recourse to. So general, indeed, has been the desire for some time past for large farms, and so deeply are the tenants impressed with the idea that respectability depends in a great degree on the possession of a considerable extent of land, that a small farmer is in their opinion deserving of little more consideration than a journeyman tradesman. It is in this feeling, I apprehend, that an explanation is partly to be found of the fact, that secondary lands have fetched, for a long time past, higher rents in proportion to their worth than the best lands; large farms of the former being easily obtainable, while it has been comparatively difficult to procure them of the latter description. The same feeling operates with small capitalists in the purchase of land. Most men would rather choose to pay the same sum for 1000 acres than for 200 or 300, though the revenue derived from the former should be somewhat less than that derived from the latter. Such being the feelings and habits that at present actuate the Scotch farmers, it is not at all likely that they should very readily diminish the size of their farms. They would think that they had not *put down*, as they express it, their sons respectably, were each of them to get only a portion of his father's farm; and in consequence, the process of splitting would for a time proceed at a comparatively slow rate. Great, however, as the obstacle to splitting, from old habits, undoubtedly is, there is but too much reason to fear that it would be gradually overcome. The sons of farmers have an almost unconquerable desire to follow the profession of their fathers. Nor will this seem wonderful to any one acquainted with the way in which they are brought up. I have seen it somewhere stated, that boys, at a very early age, show a predilection for whips, and girls for dolls. But however this may be, I am sure that a farmer's son is no sooner able to use his legs than he wishes to be master of a whip, and to be permitted to exercise it on the cattle of the farm. He is then desirous of getting on horseback; and this gratification, through the indulgence of servants, he frequently enjoys at a very early age. As he advances in life, the scene becomes more

captivating. He sees his father master of every thing upon the farm. All give way to his pleasure, and yield obedience to his commands. He seems the only being who has every wish gratified, and who possesses an undisputed power over every other person within his reach. At scarcely any period of the year do the calls of business seem to make any serious inroad either on his time or wishes. It is true he must frequently be in the fields superintending the operations going on there; but this, in most cases, appears a pleasure to a youth. Then there is the command of horses, dogs, guns, and sometimes of foxhounds; the enjoyment of which, the young men see, or think they see, is perfectly compatible with the proper management of a farm. In this manner, every thing most desirable is associated in their estimation with rural affairs, at a time too, when the mind is most capable of receiving impressions of a deep and lasting nature; and when it is considered that in all probability they have never had an opportunity of contrasting this mode of life with any thing half so captivating, can it excite any surprise that they are almost all bent on becoming farmers? Unless, indeed, a boy's parents determine at an early period to make him choose one or other of the liberal professions, or send him abroad, and have taken care to educate him with that view, he has only a choice between the business of a farmer and that of a grocer, silk-mercer, spirit-merchant, or something similar. But to learn any one of these, a three or five years' apprenticeship must be served; during which time the country youth, who used to be from morn to night in the fields, is doomed to stand twelve hours a day behind a counter, weighing pounds of tea, or measuring gallons of whiskey or yards of ribbon; and even after his apprenticeship is served, he must, if he expects to get on, apply with unremitting assiduity to business. These are some of the circumstances that render it so difficult, even as matters now stand, to get the sons of farmers to choose another profession; but they have no choice, and they know it. The large amount of capital required to stock and improve a farm of the extent necessary to insure respectability, together with the prohibition of dividing the farm among two or more sons, at the father's decease, makes it all but imperative on a farmer having three or four sons, to direct the views of two or three of them to some other profession: and this is accomplished by impressing upon their minds, from their earliest age, the utter impossibility of their ever becoming farmers. But if the latter had the power of dividing and devising their farms to their heirs, there cannot, as it appears to me, be a doubt, that the anxiety of the sons to become farmers, strengthened as their chance of attaining their object would be, by the change in the tenure under which the lands were held, would gradually and not very slowly reduce the size of farms; ultimately leading to such a

division as would render them too small to be economically and profitably occupied. At first, as farms would descend to sons of experienced farmers, there would not be any falling off in the skill of the occupiers; but when the process of subdividing and splitting had proceeded to a considerable extent, a corresponding diminution would necessarily take place in their capital and qualifications. Small farms must of necessity leave smaller profits in proportion than large ones. It is, therefore, clear that every succeeding generation, under such a system, would be worse and worse qualified for the business of husbandry. Agricultural capital can neither be brought into existence nor preserved without a large disposable produce, furnishing rent and profit; but this produce must be comparatively small in every country where the lands are split into small portions. The little farm must support a family as well as the large one; and if we may trust to Irish experience, it would appear that the number of children instead of diminishing with the diminution of farms, rather increases in an inverse ratio. At all events, the expense of cultivation cannot fail of being increased when farms are reduced below the proper size, and there must of course be either a reduction of rents, or a diminution of profits. For a considerable time, perhaps, the increased demand for farms would cause the greater part of this reduction to fall upon profits, but it would, in the end, affect rents also. As profits became less, so would the means of cultivation; and, what is perhaps of still more importance, the means of cultivating the minds of the succeeding race of farmers, without which even capital will be of as little avail as a sword in the hands of a ploughman if opposed to an expert fencer.

"In the foregoing remarks, I have considered the effects of dividing farms and devising them to heirs, on the supposition that *heirs-male* only were to be the inheritors. Were heirs-female and collateral heirs, to succeed in the same way, the interests of agriculture would suffer vastly more. It cannot be supposed that farmers' daughters should always form matrimonial connections with the sons of farmers. This, of course, frequently happens; but if farmers could leave their daughters a portion of their farms, such dowries would tempt persons belonging to less agreeable professions to seek an alliance with young women of their caste. This, in so far as it had any influence, would obviously tend to introduce a race of cultivators totally ignorant of agriculture; which, with the smallness of their farms, would assist in reducing the business of farming to the lowest ebb.

"Upon the whole, therefore, it appears to me that the present mode of letting land in Scotland upon leases of 19 or 21 years, strictly prohibiting the assigning, subletting, and dividing of farms, has materially contributed to the improvement of agriculture, and to the

respectability of the farmers. The tenure under which we hold our lands gives us perfect security that we shall reap the full benefit of our outlays, at the same time that the certainty that our interest in the land will cease at the expiration of nineteen years, prompts to a vigorous and instant execution of the necessary improvements; while the prohibition of subletting, subdividing, and assigning, effectually prevents the splitting of farms, and the introduction of a less wealthy and less intelligent class of cultivators. I should, therefore, look upon any change in the existing law of landlord and tenant, or in the custom of letting, that allowed subletting or subdivision in any form, or devising by will to heirs, as likely to prove highly injurious to the tenants and landlords."

THE END.

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